

**From:** [Magallanes, Downey](#)  
**To:** [Jonathan Wood](#); [Daniel Jorjani](#)  
**Subject:** Re: FWS Rulemaking Petitions  
**Date:** Thursday, May 18, 2017 2:44:19 PM

---

Jonathan,

I very much apologize for the delay. I am including Dan Jorjani on this email who is our new Principal Deputy Solicitor and the appropriate contact here.

Downey

On Thu, May 18, 2017 at 2:41 PM, Jonathan Wood <[jw@pacificlegal.org](mailto:jw@pacificlegal.org)> wrote:

Downey,

I'm circling back to see whether you've had an opportunity to look into the rule making petitions I mention below: one from NFIB, the other from the Washington Cattlemen's Association. As I said below, I think the petitions present an excellent opportunity for the Administration to reduce overregulation under the Endangered Species Act while also better promoting species' recovery.

You're very busy, I'm sure. But I'd be very grateful for a few minutes to discuss the status of these petitions or for any recommendation who at the Fish and Wildlife Service would be the appropriate contact. Brandon Middleton from ENRD suggested you would be in the best position to help me on this.

Thanks for your time and consideration.

Best,

Jonathan

Jonathan Wood | [PACIFIC LEGAL FOUNDATION](#)

3033 Wilson Blvd. | Arlington, Virginia 22201 | (202) 888-6881

[SSRN](#) | [Blog](#) | [Twitter](#)

---

**From:** Jonathan Wood  
**Sent:** Tuesday, April 18, 2017 2:31 PM  
**To:** '[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)' <[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)>  
**Subject:** FWS Rulemaking Petitions

Downey,

Brandon Middleton at DOJ's Environment & Natural Resources Division suggested I contact you to check in on Interior's consideration of some rulemaking petitions that [Pacific Legal Foundation](#) submitted last year. It has been a year since the first petition was submitted and I want to make sure they don't get lost in the transition between administrations.

The petitions were filed on behalf of the Washington Cattlemen's Association ([petition here](#)) and NFIB ([petition here](#)), both raising the same issue. In a nutshell, the petitions ask the Fish and Wildlife Service to repeal 50 C.F.R. § 17.31, which generally forbids the take of any species listed as threatened under the Endangered Species Act, because the regulation exceeds the Service's authority under the ESA and undermines conservation. Here's a [law review article](#) laying out the legal theory. Repealing the regulation is a [great opportunity](#) for the administration to pursue its deregulation agenda while also promoting better environmental stewardship.

Do you know who at Interior/FWS is reviewing these petitions and what the status of them are?

Jonathan Wood

Attorney

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[Articles on SSRN](#)

[Blog](#)

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--

Downey Magallanes  
Office of the Secretary  
[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)  
202-501-0654 (desk)  
202-706-9199 (cell)

**From:** [Jonathan Wood](#)  
**To:** [Magallanes, Downey](#); [Daniel Jorjani](#)  
**Subject:** RE: FWS Rulemaking Petitions  
**Date:** Thursday, May 18, 2017 3:05:33 PM

---

Downey: No need to apologize. I know you guys are very busy in the early days of the new administration. Thank you for introducing me to Dan.

Dan: It's nice to meet you. I'm trying to find out the status of two rulemaking [petitions](#) that Pacific Legal Foundation filed last year on behalf of NFIB and the Washington Cattlemen's Association. Those petitions call for the Fish and Wildlife Service to repeal 50 C.F.R. 17.31, which is the ESA regulation that generally forbids take of threatened species.

The petitions make both a policy argument (that repealing the regulation would give property owners better incentives to recover species) and a legal argument (that the regulation exceeds FWS' power under the ESA and therefore must be repealed). On the latter point, Congress consciously chose to limit the burdensome take prohibition to endangered species and did not give FWS the authority to reverse Congress' choice. Here's a [law review article](#) explaining the legal argument in more detail.

Repealing the regulation is an excellent opportunity for the Trump Administration to reduce overregulation under the ESA, while also better promoting species' recovery. It's been a little over a year since the petitions were filed and I was hoping to find out whether they're being considered or if there's any additional info I can provide to help the Administration make its decision. I'd be very grateful for a few minutes to discuss these petitions with you.

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**Sent:** Thursday, May 18, 2017 2:44 PM  
**To:** Jonathan Wood <jw@pacificlegal.org>; Daniel Jorjani <daniel\_jorjani@ios.doi.gov>  
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Do you know who at Interior/FWS is reviewing these petitions and what the status of them are?

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Office of the Secretary  
[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)  
202-501-0654 (desk)  
202-706-9199 (cell)

**From:** [Jonathan Wood](#)  
**To:** [daniel\\_jorjani@ios.doi.gov](mailto:daniel_jorjani@ios.doi.gov)  
**Subject:** Voicemail  
**Date:** Wednesday, June 21, 2017 12:48:12 PM

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Dan,

I got your voicemail and just left you one in return. I'd be happy to meet with you. Is this about the petitions I filed last year on behalf of NFIB and the Washington Cattlemen's Association? I exchanged a few emails with you and your colleague Downey about them a few months ago. If it's about something else, let me know and I'll be happy to talk about anything else I've been working on.

I'm free anytime Tuesday or Thursday next week, June 27<sup>th</sup> and 29<sup>nd</sup>. Do either of those days work for you?

I look forward to speaking with you.

Best regards,

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**From:** [Jonathan Wood](#)  
**To:** [daniel\\_jorjani@ios.doi.gov](mailto:daniel_jorjani@ios.doi.gov)  
**Subject:** RE: Voicemail  
**Date:** Wednesday, August 2, 2017 12:16:17 PM

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Dan,

I don't know if you'll recall but you left me a voicemail requesting a meeting in late June. I left you a few voicemails in response, but we ended up playing phone tag and not connecting.

I remain interested in meeting to discuss the Endangered Species Act petitions that I submitted on behalf of the National Federation of Independent Businesses and Washington Cattlemen's Association. As I explained in an earlier email to you and your colleague Downey (whom I connected with on national monument issues), the petitions present an excellent opportunity for Interior to reduce overregulation under the ESA, increase jobs, and better promoting species' recovery. It's a win-win-win.

I know how busy you must be. But if you have a moment for an in-person or telephone meeting, I'd love to discuss the petitions with you and answer any questions you may have.

Best regards,

Jonathan Wood | [PACIFIC LEGAL FOUNDATION](#)  
3033 Wilson Blvd. | Arlington, Virginia 22201 | (202) 888-6881

[Blog](#) | [SSRN](#) | [Twitter](#)

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**Subject:** Voicemail

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I'm free anytime Tuesday or Thursday next week, June 27<sup>th</sup> and 29<sup>nd</sup>. Do either of those days work for you?

I look forward to speaking with you.

Best regards,



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**From:** [Jorjani, Daniel](#)  
**To:** [jwood@pacificlegal.org](mailto:jwood@pacificlegal.org)  
**Subject:** Test message  
**Date:** Wednesday, April 4, 2018 2:50:16 PM

---



**Daniel H. Jorjani**  
Principal Deputy Solicitor  
U.S. Department of the Interior  
Main Interior Building, Suite 6356

 202-219-3861 (Voice)

 202-706-9018 (Cell)



[daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov)

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**From:** [Jonathan Wood](#)  
**To:** [Jorjani, Daniel](#)  
**Subject:** [EXTERNAL] RE: Test message  
**Date:** Wednesday, April 4, 2018 2:53:26 PM  
**Attachments:** [~WRD000.jpg](#)

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Daniel,

Great speaking to you. My contact info is below. My cell is (b) (6).

I'm happy to come in for a meeting or otherwise help in any way I can. You might also be interested to know that the Property and Environment Research Center (PERC) will soon be publishing an article I've written explaining the pro-conservation case for repealing the 4(d) rule. I'm happy to forward that along as well once it's through the editing process.

Best regards,

**Jonathan Wood** | Attorney  
Pacific Legal Foundation  
3033 Wilson Blvd, Ste 700 | Arlington, VA 22201  
(202) 888-6881  
[Twitter](#) | [Blog](#) | [Website](#)

[Pacific Legal Foundation](#)



**From:** Jorjani, Daniel [mailto:[daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov)]  
**Sent:** Wednesday, April 04, 2018 2:50 PM  
**To:** Jonathan Wood <[JWood@pacificlegal.org](mailto:JWood@pacificlegal.org)>  
**Subject:** Test message

**Daniel H. Jorjani**  
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**From:** [Jorjani, Daniel](#)  
**To:** [Richard Goeken](#); [jwood@pacificlegal.org](mailto:jwood@pacificlegal.org)  
**Subject:** Fwd: [EXTERNAL] RE: Test message  
**Date:** Wednesday, April 4, 2018 4:37:40 PM  
**Attachments:** ~WRD000.jpg

---

Jonathan - Thank you for reaching out.

Rick - Please reach out to Jonathan to bring him in and discuss.

Thank you.



**Daniel H. Jorjani**  
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----- Forwarded message -----

**From:** Jonathan Wood <[JWood@pacificlegal.org](mailto:JWood@pacificlegal.org)>  
**Date:** Wed, Apr 4, 2018 at 2:53 PM  
**Subject:** [EXTERNAL] RE: Test message  
**To:** "Jorjani, Daniel" <[daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov)>

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Best regards,

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**From:** [Jonathan Wood](#)  
**To:** [Jorjani, Daniel](#); [Richard Goeken](#)  
**Subject:** [EXTERNAL] 4(d) petition documents  
**Date:** Friday, April 6, 2018 12:14:13 PM  
**Attachments:** [DRAFT PAPER The Endangered Species Act Two-Step.docx](#)  
[~WRD001.jpg](#)  
[image001.jpg](#)

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Dan & Rick,

I look forward to meeting you both next week.

For your convenience, here are the two petitions PLF filed in 2016 calling for the blanket 4(d) rule's repeal:

[NFIB Petition](#)

[Washington Cattlemen's Association Petition](#)

The two petitions make both a legal argument for the rule's repeal, as well as a policy argument. The legal argument is based on a law review article I published in the Pace Environmental Law Journal. It's available [here](#).

Coincidentally, I also have a paper coming out next week on the conservation case for repealing the rule, which will be published by the Property and Environment Research Center (PERC). The draft of that paper is attached. Please feel free to circulate it internally to whomever it would be helpful. But please don't circulate it too far externally, since it hasn't been published yet.

Thanks and I will see you both on Monday at 5pm.

**Jonathan Wood** | Attorney  
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**From:** Jorjani, Daniel [mailto:[daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov)]  
**Sent:** Wednesday, April 04, 2018 4:38 PM  
**To:** Richard Goeken <[richard.goeken@sol.doi.gov](mailto:richard.goeken@sol.doi.gov)>; Jonathan Wood <[JWood@pacificlegal.org](mailto:JWood@pacificlegal.org)>  
**Subject:** Fwd: [EXTERNAL] RE: Test message

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**The Endangered Species Act Two-Step:  
How to Prevent Extinction and Promote Recovery**

Jonathan Wood

*The Property and Environment Research Center and the Pacific Legal Foundation*

**Introduction**

The Endangered Species Act is perhaps the United States' most popular environmental law. Despite that popularity, the statute is the subject of intense political conflicts, with supporters crediting it with saving 99 percent of listed species from extinction and critics responding that less than 2 percent of those species have recovered and come off the list.

What if both sides are right—that the statute is effective at preventing extinction but not promoting recovery? Because we care about preventing extinction *and* recovering endangered species, the challenge is to find reforms that preserve what the Endangered Species Act does well while boosting incentives for recovering species. Fortunately, the Endangered Species Act already includes a mechanism to better accomplish both goals, if we'd only take better advantage of it.

The statute provides for the listing of two categories of species: endangered and threatened, distinguished by the seriousness of the threats they face. When Congress passed the act in 1973, it envisioned states taking the lead to develop innovative means to protect threatened species, with strict federal regulations serving as a backstop to protect endangered species from extinction. The statute would accomplish this division of labor by reserving the most burdensome federal regulations for species that are listed as endangered. By imposing heavier federal burdens when a species declines and, conversely, relaxing those burdens as a species recovers, the act would also help align landowners' incentives with the interests of species, encouraging private conservation and recovery efforts.

Unfortunately, in 1975, the U.S. Fish and Wildlife Service issued a regulation that eliminated the distinction between threatened and endangered species, blunting these incentives. However, there is good reason to think that restoring the Endangered Species Act's distinction between the two categories would provide substantial conservation benefits by encouraging states and private landowners to recover threatened species. Doing so would avoid the artificial time constraint that makes it so difficult to develop collaborative conservation programs in the short window of time between a species' proposed listing and a final decision. With more time to develop innovative, market-based conservation programs, states and environmentalists could make significant strides toward species recovery. At the same time, the act's take prohibition would continue to serve its intended function as a backstop to protect endangered species from extinction.

Consequently, a return to Congress' original design offers a means of achieving both goals: maintaining the Endangered Species Act's effectiveness at preventing extinction while boosting the incentives to recover listed species.

### Prevent Extinction or Promote Recovery: A False Choice

Forty-five years after its enactment, the Endangered Species Act enjoys broad popularity. Public opinion surveys routinely show overwhelming support for the law, regardless of political party.<sup>1</sup> Despite that popularity, the act remains politically controversial, with little reason to suspect that will change anytime soon. Congressman Rob Bishop, Chairman of the U.S. House Natural Resources Committee, has proclaimed that he "would love to invalidate [it]."<sup>2</sup> He's not alone. Every year, legislation is proposed to fundamentally change the law.<sup>3</sup> Although broad reform legislation has not passed in decades, smaller reforms and species-specific exemptions have been routinely proposed and enacted.<sup>4</sup>

Political debate over the Endangered Species Act has focused on whether it is a success or a failure. To supporters, the Endangered Species Act is a success because it has saved 99 percent of listed species from extinction.<sup>5</sup> To critics, it is a failure because less than 2 percent of those species have recovered and been taken off the list.<sup>6</sup> Armed with

<sup>1</sup> Tulchin, et al., *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, Tulchin Research Memo (July 6, 2015), available at <https://earthjustice.org/sites/default/files/files/PollingMemoNationalESASurvey.pdf>.

<sup>2</sup> Darryl Fears, *Powerful lawmaker wants to 'invalidate' the Endangered Species Act. He's getting close.*, Wash. Post (Nov. 5, 2017).

<sup>3</sup> See, e.g., House Committee on Natural Resources, Press Release, *Bills to Modernize Endangered Species Act Advance Through Committee* (Oct. 4, 2017), available at <https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=403024>.

<sup>4</sup> See, e.g., Natural Resources Defense Council, *2017 Anti-Environmental Budget Riders*, NRDC.org (Nov. 28, 2017), available at <https://www.nrdc.org/resources/anti-environmental-budget-riders>.

<sup>5</sup> See Lisa Feldkamp, *What has the Endangered Species Act ever done for us? More than you think.*, Nature.org (May 8, 2017), available at <https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/>. The 99% talking point assumes that all listed species would have gone extinct but for the statute's protections. According to a widely cited study, a more accurate estimate of the number of extinctions avoided by the statute (between 1973 and 1998) was 172. See Mark W. Schwartz, *The Performance of the Endangered Species Act*, Annual Rev. of Ecology, Evolution, and Systematics Vol. 39: 279-299 (2008).

<sup>6</sup> See Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, *Environ. L. & Pol'y* J. (2014); Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011) (noting the distressingly few number of successful recoveries, several of which cannot directly be attributed to the ESA). U.S. Fish and Wildlife Service has not reported to Congress on the status of species in nearly a decade. According to that last report, only 2% of listed species were "improving." See U.S. Fish and Wildlife Service, "Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Year 2009-2010," available at [https://www.fws.gov/endangered/esa-library/pdf/Recovery\\_Report\\_2010.pdf](https://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2010.pdf).

these talking points, the two sides of this political conflict have endlessly fought over which is the better metric, with little progress.

[2490 species listed; estimate 172 extinctions avoided; 11 species extinct; 51 species recovered; 20 species delisted due to data error]

Do we have to pick one? Both statistics can be true. The Endangered Species Act can be effective at preventing extinction but ineffective at creating the necessary incentives to promote recovery efforts. Fighting over which is more important ignores that people care about achieving both goals. No one should be satisfied by species remaining at the precipice of extinction, even if they don't fall over that cliff.

Rather than arguing about which is the better metric for judging the statute, we should look for reforms that preserve what the Endangered Species Act does well while strengthening it as a tool for promoting species recovery. Maintaining the critical protections that prevent endangered species from going extinct while looking for ways to encourage private landowners to conserve and recover species is the only way to begin achieving both goals. Fortunately, the statute provides an overlooked means of doing just that.

### The Endangered Species Act Two-Step

Prior to 1973, the federal government's role in protecting endangered species was limited to regulating federal lands and federal actions that jeopardized these species.<sup>7</sup> Channeling Benjamin Franklin's witticism that "an ounce of prevention is worth a pound of cure," President Nixon called for a new endangered species law that would allow for federal intervention earlier, before a species' status became too bleak, as well as regulation of private activities that threaten endangered species.<sup>8</sup> Congressman Dingell, the Endangered Species Act's principal sponsor, similarly urged proactive protection of species that "are not yet on the brink of extinction."<sup>9</sup>

From this desire, the act's two-step process was born. The law provides for the listing of two categories of species: "Endangered" species are those currently at risk of

**Commented [1]:** Which categories do you think we should report? This is all species. But it might make more sense to focus on only domestic and/or only those regulated by FWS. Those are the species most directly affected by the statute's prohibitions.

<sup>7</sup> See George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. Rev. 315, 317 (1975).

<sup>8</sup> Richard Nixon, State of the Union Message to the Congress on Natural Resources and the Environment (Feb. 15, 1973) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=4102>).

<sup>9</sup> Cong. Research Serv., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 72 (statement of Rep. Dingell) (henceforth "ESA Legislative History"); *id.* at 193 (describing the protection of threatened species as the Endangered Species Act's most important innovation). Congressman Dingell was not alone in stressing the expansion of protection to threatened species as the statute's core innovation. See, e.g., *id.* at 204 (statement of Rep. Clausen) ("The most important feature of the bill is the provision extending protection to animals and plants which may become endangered within the foreseeable future. In the past, little action was taken until the situation became critical and the species was dangerously close to total extinction.").



extinction, and “threatened” species are those at risk of becoming endangered in the foreseeable future.<sup>10</sup> The latter category is far broader than the former, providing an added measure of protection against a species’ decline. For example, species can be listed as threatened if their populations are currently healthy—or even growing—if they are anticipated to decline decades from now.<sup>11</sup>

[Textbox: Endangered species may have only a few, small populations, whereas threatened species can be numerous and widely distributed. For example, recent surveys of the endangered delta smelt have found as few as six in the San Francisco Bay Delta, the only place where the species is found.<sup>12</sup> In contrast, there are millions of northern long-eared bats, a threatened species found in 37 states.<sup>13</sup>]

These categories were intended to be more than an academic distinction. The statute provides different degrees of regulation for endangered and threatened species commensurate with the threats they face. Endangered and threatened species are both protected from federal actions that could adversely affect them or their habitat.<sup>14</sup> But, as an added measure of protection, the statute also prohibits private activities that affect endangered species—which the statute defines as “take”—unless authorized by a federal permit.<sup>15</sup> Applying for a permit is a costly and time-consuming endeavor that can delay projects indefinitely and, if a permit is granted, substantially increase the project’s costs. That prohibition is backed up by substantial civil and criminal penalties.<sup>16</sup> Private parties, including environmental groups, can also enforce this prohibition through litigation to enjoin take.

When you hear the term “take,” you probably think of activities that kill or harm wildlife. But the statute defines it far more broadly. Catching a protected species without a federal permit or getting too close to one is considered take. The statute has also been interpreted by the Fish and Wildlife Service to include “incidental take”—actions that

<sup>10</sup> 16 U.S.C. § 1532(6) and 16 U.S.C. § 1532(20).

<sup>11</sup> The polar bear, for instance, has been listed as threatened based on projected loss of sea ice due to climate change even though, at the time of listing, the Secretary of Interior estimated that the global population had doubled in the previous four decades. Rachel Weisel, *Polar Bear Population*, FactCheck.org (June 18, 2008), <https://www.factcheck.org/2008/06/polar-bear-population/>.

<sup>12</sup> Jane Kay, *Delta Smelt, Icon of California Water Wars Is Almost Extinct*, Nat’l Geo. (Apr. 3, 2015).

<sup>13</sup> There is no single range-wide population estimate for the northern long eared bat. But the U.S. Fish and Wildlife Service acknowledges, based on several regional estimates, that the total population is at least several million. 80 Fed. Reg. 17,974 (Apr. 2, 2015).

<sup>14</sup> 16 U.S.C. §§ 1531(c)(1), 1533(a)(3), 1536.

<sup>15</sup> 16 U.S.C. § 1538(a) (prohibiting take of “any endangered species”),

<sup>16</sup> 16 U.S.C. § 1540 (providing civil and criminal penalties for violations).

unintentionally affect species—including land use activities that adversely modify habitat, such as building homes, farming, or harvesting timber.<sup>17</sup>

Take is defined so broadly that it can even include activities to recover species. For instance, the Nigiri Project, a collaboration between UC Davis and conservation group California Trout, aims to recover California's salmon populations by encouraging rice farmers to allow salmon to use their flooded fields as habitat.<sup>18</sup> Those fields mimic the floodplain habitat that salmon relied upon before modern water infrastructure. Giving juvenile salmon access to insect-rich flooded fields allows them to grow bigger before migrating to the ocean, boosting survival rates.<sup>19</sup> Because catching salmon and moving them to these fields is considered a form of "take," the project required a federal permit. According to CalTrout senior scientist Jacob Katz, the biggest obstacle the project faced was convincing federal and state government to issue the required permits for them to move fish to the new habitat.<sup>20</sup>

The take prohibition can also complicate state efforts to recover species, as was recently shown in the conflict between the U.S. Fish and Wildlife Service and the state of Utah over the threatened Utah prairie dog.<sup>21</sup> To provide for the species' long-term recovery, as well as reduce landowner animosity, Utah developed a plan to move prairie dogs from residential areas to public lands where the state had improved habitat. After a lawsuit resulted in an injunction against enforcement of the federal take prohibition for this species, the state was free to implement its plan for two years. But the state's plan ground to a halt when the injunction was overturned on appeal. Now, resuming the conservation program will require changing the federal regulation or navigating the costly and time-consuming federal permitting process.<sup>22</sup>

Acknowledging that the broad take prohibition imposes significant burdens, Congress deemed it necessary as the last line of defense to protect endangered species from

<sup>17</sup> 16 U.S.C. § 1532(19); see *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995) (upholding the Fish and Wildlife Service's interpretation).

<sup>18</sup> UC Davis, *Nigiri Project Mixes Salmon and Rice Fields for Fifth Year on Floodplain* (Feb. 23, 2016), <https://www.ucdavis.edu/news/nigiri-project-mixes-salmon-and-rice-fields-fifth-year-floodplain>; California Trout, *The Nigiri Concept: Salmon Habitat on Rice Fields*, <http://caltrout.org/regions/central-california-region/the-nigiri-concept/>.

<sup>19</sup> CapRadio, *A 'Floating Fillet': Rice Farmers Grow Bugs to Help Restore California's Salmon* (Jan. 23, 2018), <https://www.youtube.com/watch?v=Lg4ycKF6dSQ>.

<sup>20</sup> Conversation with Jacob Katz.

<sup>21</sup> See Jonathan Wood, *A Prairie Home Invasion*, PERC Report 36 No. 2 (Winter 2017), available at <https://www.perc.org/articles/prairie-home-invasion>. I, along with my Pacific Legal Foundation colleagues represented landowners in a challenge to this federal regulation, a lawsuit which ultimately led to the state's conservation program.

<sup>22</sup> See Lindsay Whitehurst, *Prairie dog endangered-species plan eases rules under Trump*, Chicago Tribune (Dec. 20, 2017), [www.chicagotribune.com/lifestyles/pets/sns-bc-ut-prairie-dogs-20171220-story.html](http://www.chicagotribune.com/lifestyles/pets/sns-bc-ut-prairie-dogs-20171220-story.html) (describing a proposed federal plan that would allow the state plan to resume).

extinction. But Congress did not make the same judgment for threatened species. Instead, the Endangered Species Act explicitly excludes threatened species from the take prohibition. Senator Tunney, the floor manager of the bill that became the act, explained this was intended to allow states to experiment with efforts to recover threatened species:

The two levels of classification facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions. Since most of our resources for restoring and propagating species lie with the States, they are encouraged to use their discretion to promote the recovery of threatened species and Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction.<sup>23</sup>

That description may sound foreign to anyone familiar with how the statute is implemented today.<sup>24</sup> Since 1975, the U.S. Fish and Wildlife has prohibited the take of all threatened species by regulation, unless it adopts another regulation relaxing that prohibition for a particular species.<sup>25</sup> Under this approach, threatened and endangered species are treated the same regardless of the degree of threats they face. That is, despite Congress' original distinction between the two categories of species, the Endangered Species Act's prohibition on take applies equally to both threatened and endangered species today. When announcing that the Florida manatee's status was being upgraded from endangered to threatened, Chuck Underwood, of the U.S. Fish and Wildlife Service's Florida Office, underscored this reality: "People have misperceptions that we have two lists. It's one classification."<sup>26</sup> For the manatee, like many other species, the fact that the species' status had improved enough that it no longer needed to be classified as endangered did not come along with any regulatory relief for the affected parties. They would remain regulated just as they had been when the manatee was endangered.

[Because threatened species are usually more numerous and widely distributed than endangered species, the application of the U.S. Fish and Wildlife Service's regulation to threatened species has been the source of some of the biggest conflicts that have arisen under the Endangered Species Act. For instance, it was at the center of the conflict over the

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<sup>23</sup> ESA Legislative History at 358 (statement of Sen. Tunney).

<sup>24</sup> The National Marine Fisheries Service, which implements the Endangered Species Act for marine species, still honors the distinction between endangered and threatened species. But that agency is responsible for less than one in ten listed species. See NOAA Fisheries, *Endangered and Threatened Marine Species*, [www.nmfs.noaa.gov/pr/species/esa/](http://www.nmfs.noaa.gov/pr/species/esa/).

<sup>25</sup> Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44, 412, 44,414 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.31).

<sup>26</sup> See Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, AL JAZEERA AM. (Aug. 8, 2014 5:00 AM) <http://america.aljazeera.com/articles/2014/8/8/reclassifyingfloridamanatees.html>. The decision to change the manatee's status to threatened was in response to a petition and several follow-up lawsuits filed by the Pacific Legal Foundation.



threatened listing of the northern spotted owl, which significantly reduced timber harvesting in the Pacific Northwest.<sup>27]</sup>

Because the U.S. Fish and Wildlife Service regulation purports to overrule Congress' decision to regulate endangered and threatened differently, some have argued that it violates the statute but that question has not been much scrutinized by courts.<sup>28</sup> Legal infirmities aside, treating endangered and threatened species the same is an ineffective means of conserving and recovering species. As the next section explains, a return to Congress' original two-step approach would provide better incentives for recovery efforts and could boost the recovery rate of endangered species. And, importantly, that improvement would not come at the expense of the statute's effectiveness at preventing extinction of endangered species.

### The Carrot and the Stick

Private landowners are essential to the conservation and recovery of endangered species because they provide habitat for the overwhelming majority of listed species.<sup>29</sup> Consequently, creating incentives for landowners to conserve and enhance habitat is critical to promoting species' recovery.

Unfortunately, the Endangered Species Act, as currently implemented, gets the incentives backward. Landowners who provide habitat to listed species receive no benefit under the statute; instead, the statute penalizes them by imposing costly regulatory burdens such as restrictions on land use, reduced property values, and costly permitting requirements. By making a threatened or endangered species a liability, rather than an asset, the statute could encourage property owners to adopt a strategy of "shoot, shovel, and shut up"<sup>30</sup>—which, as its name suggests, does not end well for the listed species.

Fears about the impact of the statute's perverse incentives are well founded. In a study of timberland owners' responses to Endangered Species Act regulations, Dean Lueck

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<sup>27</sup> See Scott Learn, *Northern spotted owl marks 20 years on endangered species list*, *The Oregonian*, June 25, 2010,

[http://www.oregonlive.com/environment/index.ssf/2010/06/northern\\_spotted\\_owl\\_marks\\_20.html](http://www.oregonlive.com/environment/index.ssf/2010/06/northern_spotted_owl_marks_20.html).

<sup>28</sup> Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 *Pace Env'tl. L. Rev.* 23 (2015); see Robert Gordon, *Take It Back: Extending the Endangered Species Act's "Take" Prohibition to All Threatened Animals is Bad for Conservation*, Heritage Foundation Background (Dec. 7, 2017), <https://www.heritage.org/sites/default/files/2017-12/BG3267.pdf>.

I represent the National Federation of Independent Businesses and the Washington Cattlemen's Association on a pair of rulemaking petitions asking the U.S. Fish and Wildlife Service to withdraw this regulation.

<sup>29</sup> See Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Report (1995).

<sup>30</sup> See Ronald Bailey, "Shoot, Shovel, and Shut Up": Celebrating 30 years of failing to save endangered species, *Reason* (Dec. 31, 2003), <http://reason.com/archives/2003/12/31/shoot-shovel-and-shut-up>.

and Jeffrey Michael found that owners accelerated timber harvesting to prevent their trees from becoming habitat for the red-cockaded woodpecker.<sup>31</sup> This is a rational response because, from an individual landowner's perspective, the costs of federal regulation exceed the benefits of conservation. Sam Hamilton, a former director of the U.S. Fish and Wildlife Service has summed up the problem well: "The incentives are wrong here. If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears."<sup>32</sup>

Treating endangered and threatened species the same confounds the problem by making property owners indifferent to how vulnerable a species is once it is listed. Under the U.S. Fish and Wildlife Service's regulation, a property owner has few incentives to help recover an endangered species because she will face the same regulatory burdens even if the species' prospects improve and its status is changed to threatened. There's no reward for the landowner, unless she can recover the species to the point that it can be completely delisted, a rare occurrence—only 51 out of 2490 endangered species have ever been delisted.

Likewise, once a species is listed as threatened, the same intense regulatory burdens apply to landowners regardless of whether the species is imminently at risk of extinction or faces only remote threats decades in the future. More alarmingly, as a species' status worsens the easiest means of escaping those regulatory burdens may be for the species to go extinct.

Returning to Congress' approach of regulating endangered and threatened species differently would improve incentives by aligning landowners' interests with those of species. Recovery efforts can be difficult, expensive, and time consuming. They also often require the participation of private landowners to supply critical habitat. For property owners to bear these costs, there must be some upside when a species' prospects improve. If landowners knew that success would result in reduced regulatory burdens, that would be more likely to provide a significant "carrot" to entice recovery efforts.<sup>33</sup>

Similarly, returning to Congress' graduated approach to regulating listed species would likely encourage landowners to work with states and conservation groups to proactively conserve threatened species. Under Congress' original two-step approach, a threatened listing would serve as a signal that a species was at risk of becoming

**Commented [2]:** If we decide to limit the graph above to domestic and/or FWS species, we'll want to update this statistic accordingly.

<sup>31</sup> See Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003). Lueck and Michael's findings have been supported by other studies. See List, et al., *Is the Endangered Species Act Endangering Species?*, NBER Working Paper 12777 (2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=953200](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=953200); Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 32 Econ. Inquiry 150 (2004).

<sup>32</sup> Betsy Carpenter, "The Best Laid Plans," U.S. News and World Report, vol. 115, no. 13 (1993), p. 89.

<sup>33</sup> In theory, this could happen under the status quo by the adoption of a special rule to relax those regulations for a particular species. But such rule require a costly and time-consuming rulemaking process, making them rare and thus their adoption unpredictable for landowners.

endangered, encouraging states, landowners, and other groups to recover the species. If recovery efforts did not occur, the species could continue to slide, triggering increased regulatory burdens (“the stick”). Collaborations would be easier to develop because landowners would have greater incentives to participate, and no federal permit would be required if the conservation efforts require minor or incidental take. Together, these factors could dramatically reduce the costs for states and conservation groups to develop innovative partnerships with habitat owners.

### Building on Obama-Era Reform

This is not the first reform proposal aimed at improving incentives by adjusting regulatory burdens. To its credit, the U.S. Fish and Wildlife Service has several discretionary programs that permit take in exchange for conservation benefits. Through habitat conservation plans, for instance, the agency authorizes some amount of incidental take in exchange for conserving and improving habitat elsewhere.<sup>34</sup>

These discretionary options all have a common shortcoming: They require an uncertain, costly, and time-consuming pre-approval process. For instance, the Southern Edwards Plateau Habitat Conservation Plan, which was created for nine endangered species in Bexar County, Texas, took six years to negotiate and obtain federal approval.<sup>35</sup> For many projects, such a long delay is at best extremely costly and at worst a dealbreaker.

The impacts of the costly and time-consuming permit process is not limited to economic development projects. Even efforts to conserve species can be discouraged or bogged down by the process. The Nigiri Project described above, for instance, was fortunate to have the support of a premier research university behind it, which helped navigate that process. That project is not unique. For instance, the costs and delays of federal take permits threatened to shut down hunting ranches responsible for growing large populations of three endangered antelope species, until Congress passed a law exempting them from that process.<sup>36</sup>

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<sup>34</sup> U.S. Fish & Wildlife Service, *Habitat Conservation Plans*, <https://www.fws.gov/endangered/what-we-do/hcp-overview.html>. For other programs that trade reduced regulations for conservation benefits, see U.S. Fish & Wildlife Service, *For Landowners: Conservation Banking*, <https://www.fws.gov/endangered/landowners/conservation-banking.html>; and U.S. Fish & Wildlife Service, *Candidate Conservation: Candidate Conservation Agreements*, <https://www.fws.gov/endangered/what-we-do/cca.html>.

<sup>35</sup> See Brendan Gibbons, *Habitat plan approved to protect nine endangered species*, San Antonio Express-News (Dec. 29, 2015), <https://www.expressnews.com/news/local/article/Habitat-plan-approved-to-protect-nine-endangered-6721825.php>.

<sup>36</sup> See Terry L. Anderson, *When the Endangered Species Act Threatens Wildlife*, Wall St. J. (Oct. 20, 2014), <https://www.wsj.com/articles/terry-l-anderson-when-the-endangered-species-act-threatens-wildlife-1413846579>.

As Ya-Wei Li of Defenders of Wildlife has explained, the need for pre-approval in each of these options necessarily introduces substantial delay and uncertainty.<sup>37</sup> For example, an applicant must submit extensive application materials and undergo an environmental review by the agency. Preparing those materials is costly, and the time spent on them takes away from other productive endeavors. And all of this must be done with little or no certainty that the permit or plan will be approved.

Overall, Li observes, these options “impose substantial workload on applicants and [the federal government], thus hindering the agencies from carrying out other conservation activities.”<sup>38</sup> The same is true for property owners. By increasing the costs of private conservation, this burdensome process can hinder private efforts to recover species. It can especially discourage conservation by property owners who are not intrinsically motivated to consider species, who may abandon projects that could otherwise incorporate environmental benefits.

Restoring the statute’s distinction between endangered and threatened species would reduce these obstacles by removing barriers to projects involving threatened species, including habitat improvement projects. The result would be greater incentives for conservation and, ultimately, faster and more widespread recovery of listed species. For instance, habitat conservation projects that could involve a form of take would no longer need to undergo the federal pre-approval process. And, even for endangered species, landowners would be more willing to navigate the process if they knew that they would be rewarded by reduced regulatory restrictions if the recovery effort succeeds.

This reform would expand upon actions by the Obama administration to promote state and private conservation programs as a means of avoiding the need to list species as threatened or endangered.<sup>39</sup> The Policy for Evaluating Conservation Efforts when Making Listing Decisions (PECE), a U.S. Fish and Wildlife Service policy issued in 2003 but used to great effect by the Obama administration, permits the U.S. Fish and Wildlife Service to forego listing a species if state and private conservation efforts are likely to reduce threats to the species.<sup>40</sup> For several controversial species, the agency used this authority to work

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<sup>37</sup> See Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, Defenders of Wildlife ESA Policy White Paper Series (2017). Li’s report recommends administrative changes to allow for expanded use of so-called “special 4(d) rules” which exempt individual threatened species from the take prohibition to varying extents. Although Li correctly diagnoses the obstacles landowners face in seeking permits or habitat conservation plans, his proposal does not avoid them. Special 4(d) rules require an extensive notice-and-comment process that can take years, can get mired in litigation, and have no clear standards that conservationists, landowners, and states can rely on to make their case for one.

<sup>38</sup> See *id.*

<sup>39</sup> In addition to these collaborative efforts, the Obama Administration also adopted more Special 4(d) Rules than any prior administration. See *id.*

<sup>40</sup> U.S. Fish & Wildlife Service and Nat’l Oceanic and Atmospheric Admin., *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, 68 Fed. Reg. 15100 (Mar. 28, 2003).



with states, industry, property owners, and environmentalists to proactively conserve species, avoiding the need to list them and the regulatory burdens that would result.

[Text box: The greater sage grouse, the largest species of grouse in North America, is known for courtship displays involving dozens of male birds puffing out their chests and strutting to attract females.<sup>41</sup> In 2010, the U.S. Fish and Wildlife Service determined that the greater sage grouse warranted listing under the Endangered Species Act but that the listing was precluded by higher priorities.<sup>42</sup> A listing would have been severely disruptive because the bird's range covers 165 million acres in 11 states and overlaps with key oil and renewable energy development sites.<sup>43</sup> Responding to these concerns, the U.S. Department of Agriculture launched the Sage Grouse Initiative in 2010, with a goal of conserving the species through partnerships with states, property owners, and conservation groups.<sup>44</sup> The effort brought together such disparate groups as ranchers, Conoco-Phillips, and the National Audubon Society. Buy-in from private property owners was essential because 81 percent of the species' wetland habitat is on private land. Over the next five years, the initiative enrolled landowners owning 4.4 million acres of habitat and enhanced 400,000 acres by removing invasive plant species.<sup>45</sup> In 2015, the U.S. Fish and Wildlife Service announced that the species no longer warranted listing due in large part to this conservation effort.<sup>46</sup>]

[Text box: The gopher tortoise, native to the southeastern United States, is known for digging long burrows that provide habitat for more than 300 other species. Construction has fragmented the species' habitat, which led the U.S. Fish and Wildlife Service to declare

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<sup>41</sup> Audubon, *Greater Sage-Grouse*, [www.audubon.org/field-guide/bird/greater-sage-grouse](http://www.audubon.org/field-guide/bird/greater-sage-grouse).

<sup>42</sup> The U.S. Fish and Wildlife Service issues a "warranted but precluded" decision if a species meets one of the definitions for listing but the agency's limited budget is better put to listing higher priority species. Once the agency clears its backlog of species waiting to be added to the list, it moves forward on listing those species deemed warranted but precluded.

<sup>43</sup> U.S. Fish & Wildlife Serv., *The Greater Sage-grouse; Facts, Figures and Discussion*, [http://fws.gov/greatersagegrouse/factsheets/GreaterSageGrouseCanon\\_FINAL.pdf](http://fws.gov/greatersagegrouse/factsheets/GreaterSageGrouseCanon_FINAL.pdf).

<sup>44</sup> Sage Grouse Initiative, <https://www.sagegrouseinitiative.com/about/>.

<sup>45</sup> Sec. Tom Vilsack, *New Sage Grouse Conservation Strategy Good for Cattle Ranches, Good for Birds*, [usda.gov](https://www.usda.gov/media/blog/2015/08/27/new-sage-grouse-conservation-strategy-good-cattle-ranches-good-birds) (Aug. 27, 2015), <https://www.usda.gov/media/blog/2015/08/27/new-sage-grouse-conservation-strategy-good-cattle-ranches-good-birds>.

<sup>46</sup> Fish & Wildlife Serv., *12-Month Finding on a Petition to List Greater Sage-Grouse as an Endangered or Threatened Species*, 80 Fed. Reg. 59,858 (Oct. 2, 2015). Coinciding with the decision not to list the species, the Bureau of Land Management and U.S. Forest Service also announced controversial land use plans to restrict federal land use to protect the sage grouse. See Dept. of Interior, Press Release, *Historic Conservation Campaign Protects Greater Sage-Grouse* (Sept. 22, 2015), <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>. Three years later, those plans remain divisive, with supporters claiming they are preferable to a listing and proof that the Sage Grouse Initiative worked and opponents criticizing them for inconsistency with state and private conservation efforts. Regardless of where you come down on that dispute, the state and private conservation efforts undertaken show that the desire to avoid federal regulation can be a powerful motivator for conservation.

that the eastern population of the species warranted listing but that it was precluded by higher priorities.<sup>47</sup> Recognizing the consequences of a listing, the states of Florida and Georgia developed plans to proactively preserve them. Florida required developers whose projects that would impact gopher tortoises to relocate the animals to suitable habitat.<sup>48</sup> Georgia has partnered with the Department of Defense, state agencies, state industry groups, and the Nature Conservancy on a \$150 million project to conserve habitat.<sup>49</sup>

These conservation partnerships provide powerful evidence that the desire to avoid burdensome regulatory restrictions can motivate property owners to work with states and conservation groups to conserve and recover species. However, these partnerships still face significant obstacles that could be avoided by restoring the Endangered Species Act's original two-step approach.

Because pre-listing conservation efforts must be planned and agreed to between the time that a species is proposed for listing and a final decision, they are subject to a significant and artificial time constraint. The Endangered Species Act requires listing decisions to be made in about one year.<sup>50</sup> Due to resource constraints, that deadline is routinely missed, but listing supporters can sue to force the agency to decide whether to list a species as quickly as practicable.<sup>51</sup>

Consequently, whoever is leading a pre-listing conservation effort must get everyone to the table, develop a conservation strategy, secure funding, and prove landowners' willingness to participate—all within the short span between the federal agency initiating the listing process and making a final decision. If potential participants doubt that a pre-listing strategy can be completed in time—a likely concern for species that have generated conflict in the past—the effort may be abandoned in its infancy.<sup>52</sup>

The mad dash to finish a pre-listing conservation plan also makes it more difficult to anticipate potential issues that may arise in the future. Focusing on immediate and easily

<sup>47</sup> 76 Fed. Reg. 45,130 (July 27, 2011).

<sup>48</sup> Lisa Conley, *New project will require relocation of gopher tortoise*, Naples Daily News (July 1, 2016), <https://www.naplesnews.com/story/news/local/communities/marco-eagle/2016/07/01/new-project-will-require-relocation-of-gopher-tortoise/86632034/>.

<sup>49</sup> Georgia Conservancy, *Gopher Tortoise Initiative*, <https://www.georgiaconservancy.org/gophertortoise>; Jonathan Wood, *Voluntary Conservation to the Gopher Tortoise's Rescue*, PERC.org (Feb. 7, 2018), <https://www.perc.org/2018/02/07/voluntary-conservation-gopher-tortoises-rescue/>.

<sup>50</sup> 16 U.S.C. § 1533(b)(3).

<sup>51</sup> See Government Accountability Office, *Environmental Litigation: Information on Endangered Species Act Deadline Suits*, GAO-17-304 (Feb. 2017), <https://www.gao.gov/assets/690/683058.pdf>.

<sup>52</sup> Recognizing the difficulties of overcoming this time constraint, Congressman Gardner of Colorado proposed legislation to delay a listing decision on the greater sage grouse for five years. Bruce Finley, *Cory Gardner introduces act to delay endangered decision on grouse*, Denver Post (Apr. 22, 2015), <https://www.denverpost.com/2015/04/22/cory-gardner-introduces-act-to-delay-endangered-decision-on-grouse/>.

identified threats to species may work in the short term. But as markets, technology, and land uses change, new threats may arise, and the potential listing may rear its head once again, as it has in the case of the dunes sagebrush lizard. At that point, it will be another race against time, as a new conservation plan will have to be completed before the listing process concludes.

This time constraint compounds the difficulty of overcoming the substantial cost of conservation efforts and uncertainty among landowners. Depending on a species' needs, conservation efforts may cost tens of millions of dollars, including foregone productive land-use activities. Additionally, landowners may be skeptical whether the species would be listed without their cooperation or whether their efforts will succeed in avoiding a listing.<sup>53</sup>

Returning to Congress' two-step approach would eliminate the artificial time constraint by bringing this conservation planning within the Endangered Species Act process, rather than operating outside of it through the PECE's pre-listing process. Once a species is listed as threatened, states, industry, property owners, and conservationists would have the flexibility to develop innovative conservation strategies and build the trust needed to make them effective. Participants would have the confidence that their efforts were necessary, because the species has already been declared as threatened. And conservation programs would have the time and flexibility to adapt to changing circumstances. As new threats arose, participants could incorporate measures to mitigate them, without having to rush to beat a listing decision.

The U.S. Fish and Wildlife Service would also have the benefit of watching these conservation efforts play out, rather than having to make a listing decision based on speculation. After a species is listed as threatened, the agency would not face a mandatory deadline to force premature analysis. So long as the species does not continue to slide to the point of becoming endangered, the agency could study the actual results of recovery efforts over time.

Similarly, this change would address environmentalists' concerns about the risk of backsliding under the PECE approach. If the effort succeeds in avoiding the listing, the argument goes, the incentive for landowners to follow through will be reduced once the decision not to list the species is announced.<sup>54</sup> A return to Congress' original design would solve this problem by allowing species to be listed as threatened without sacrificing state and private parties' flexibility to develop conservation plans. And because the species has

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<sup>53</sup> The Service could list a species as threatened and adopt a special rule to relax the take prohibitions impacts on property owners. But, like the Service's other discretionary options, that approach is difficult for landowners to rely on, costly, and time-consuming. To issue such a rule, the Service would have to navigate the notice-and-comment rule making process, which has historically limited these rules to a handful per year.

<sup>54</sup> See, e.g., Emily Sohn, *A Grand Experiment on the Grasslands*, Biographic.com (Mar. 13, 2018), <http://www.biographic.com/posts/sto/a-grand-experiment-on-the-grasslands> (quoting Ya-Wei Li of Defenders of Wildlife as asking "What incentive is there to enroll if there isn't a threat of listing?").

been listed, the potential for species-specific regulations of take would serve as a continual incentive to follow through on these plans.

[Text box: The lesser prairie chicken is a small species of grouse found in Kansas, Colorado, Oklahoma, Texas, and New Mexico, including areas important to energy development and agriculture. In 2012, the U.S. Fish and Wildlife Service proposed to list the lesser prairie chicken as threatened. To avoid the economic and political consequences of a listing, the Western Association of Fish and Wildlife Agencies developed a range-wide conservation plan for the species, working with the affected states, property owners, and conservation groups.<sup>55</sup> Under the plan, the lesser prairie chicken population climbed from 19,000 in 2013 to nearly 29,000 in 2015. Drought reduced the population to 25,000 in 2016 but it has surged again to more than 33,000 today.<sup>56</sup> In 2014, the U.S. Fish and Wildlife Service proceeded to list the species anyway, arbitrarily assuming—contrary to the PECE and its actions on several other species—that this voluntary conservation would be abandoned if the agency declined to list the species.<sup>57</sup> That decision was overturned by a federal court.<sup>58</sup> But the saga continues. After a drought reduced the population in 2016, several groups petitioned to have the species listed again.<sup>59</sup> The agency is expected to consider listing the species again in 2018.]

[Text box: The dunes sagebrush lizard lives in 650,000 acres of shinnery oak dune habitat in Texas and New Mexico, overlapping with the Permian Basin—a major source of fossil fuel and renewable energy development. Citing habitat fragmentation and invasive mesquite plants crowding out shinnery oak, the U.S. Fish and Wildlife Service proposed to list the species in 2010. To avoid economic disruption, Texas and New Mexico enlisted the help of landowners, industry, and conservation groups to develop a voluntary plan.<sup>60</sup> Under the Texas plan, for instance, energy developers paid fees to fund the removal of old infrastructure that fragmented habitat and mesquite plants that crowded out shinnery

<sup>55</sup> See Hannah Downey, PERC Case Study, *Easements for Endangered Species: A Collaborative Approach to Saving the Lesser Prairie Chicken* (Dec. 2017), available at <https://www.perc.org/wp-content/uploads/old/pdfs/lesser-prairie-chicken-case-study.pdf>.

<sup>56</sup> See McDonald, et al., Western Association of Fish and Wildlife Agencies Report: Range Wide Population Size of the Lesser Prairie-Chicken 2012 to 2017 (Sept. 5, 2017), available at <http://lpcinitiative.org/wp-content/uploads/LEPCAerialSurvey2017Report.pdf>.

<sup>57</sup> 79 Fed. Reg. 29,974 (Apr. 10, 2014).

<sup>58</sup> Phil Taylor, *Prairie chicken ruling casts doubt on FWS listing policy*, E&E News reporter (Sept. 3, 2015), <https://www.eenews.net/stories/1060024255>.

<sup>59</sup> 81 Fed. Reg. 86,315 (Nov. 30, 2016).

<sup>60</sup> Kate Galbraith, *Combs, Oil Groups Applaud Decision to Keep Lizard Off Endangered List*, Texas Trib. (June, 13, 2012), <https://www.texastribune.org/2012/06/13/texas-oil-groups-applaud-key-lizard-decision/>.



oak.<sup>61</sup> Ken Salazar, the secretary of the interior during the Obama administration, praised the effort as “a great example of how states and landowners can take early, landscape-level action to protect wildlife habitat.”<sup>62</sup> Based on the plans, the U.S. Fish and Wildlife Service declined to list the species.

Because the plans had to be finalized in the mere two years between the proposed listing and final decision, the states focused on the most pressing existing threat—energy development. Five years later, sand mining has arisen as a new threat to the species.<sup>63</sup> Incorporating sand mining into the plan will require additional creativity. However, incorporating this new threat into the plan will have to be rushed because a petition to list the species will force the U.S. Fish and Wildlife Service to make a decision on the species prematurely or face more lawsuits.<sup>64</sup>

### **Making the Endangered Species Act’s Two-Step Work**

The Obama administration’s pre-listing conservation efforts show that avoiding regulatory restrictions can be a powerful incentive for conservation. Thus, they suggest that a return to the statute’s original approach of regulating endangered and threatened species differently would promote conservation and recovery. And because this reform will not alter the regulatory restrictions for endangered species, it will not risk the statute’s effectiveness at preventing extinctions.

Although environmentalists should embrace this opportunity to boost the Endangered Species Act’s recovery rate without sacrificing its effectiveness at preventing extinction, there will inevitably be healthy skepticism about any such reform proposal. After all, changing the way the law treats threatened species involves a degree of deregulation. Won’t the result simply be more takes of threatened species without any corresponding conservation benefit?

There are several reasons why this is unlikely. First, under this proposal, landowners would have strong incentives to recover threatened species, not harm them. In fact, landowners would be harming themselves if they did not work to recover threatened

<sup>61</sup> Terrence Henry, *How the Conservation Plan for the Dunes Sagebrush Lizard Works*, NPR (June 15, 2012), <https://stateimpact.npr.org/texas/2012/06/15/how-the-conservation-plan-for-the-dunes-sagebrush-lizard-works/>.

<sup>62</sup> U.S. Dept. of Interior, News Release, *Landmark Conservation Agreements Keep Dunes Sagebrush Lizard off the Endangered Species List in NM, TX* (June 13, 2012), [https://www.fws.gov/southwest/es/Documents/R2ES/NR\\_for\\_DSL\\_Final\\_Determination\\_13June2012.pdf](https://www.fws.gov/southwest/es/Documents/R2ES/NR_for_DSL_Final_Determination_13June2012.pdf).

<sup>63</sup> Shannon Najmabadi, *Report: Sand miners disturbing threatened West Texas lizard’s habitat*, Texas Trib. (Sept. 25, 2017), <https://www.texastribune.org/2017/09/25/west-texas-lizard-threatened-sand-miners/>.

<sup>64</sup> Mella McEwan, *Comptroller warns of new efforts to list lizard*, Midland Reporter Telegraph (Sept. 21, 2017), <https://www.mrt.com/business/oil/article/Comptroller-warns-of-new-efforts-to-list-lizard-12219010.php>.

species. If the species continues to decline, it will be listed as endangered and landowners will face far greater regulatory burdens than they would have by cooperating to conserve the species.

Second, property owners whose activities require federal funding or permitting would continue to be subject to the Endangered Species Act's consultation requirement, even if the species in question is only listed as threatened. Only by recovering the species to the point that it can be delisted entirely can property owners avoid this regulatory burden.

Third, the statute contains a mechanism to deal with bad actors without upending the incentives to conserve and recover species. The U.S. Fish and Wildlife Service is required to reassess listed species, including threatened species, every five years.<sup>65</sup> If during one of these five-year reviews the agency finds that some form of intentional take is significantly undermining a threatened species, it can adopt a regulation that narrowly targets that problem without criminalizing all forms of incidental take or otherwise undermining the incentives for voluntary conservation.<sup>66</sup> The mere threat that an agency may adopt such a regulation could be sufficient to motivate cooperation.<sup>67</sup> Because these reviews occur periodically after a threatened species has been listed, they will give states, conservationists, and property owners the necessary breathing room to develop innovative conservation plans.

Finally, states can intervene to ensure that threatened species are adequately protected, just as Congress intended. The form of those interventions may vary from state to state, with some states focusing on regulation while others provide positive incentives for conservation. Increasing the role of federalism in recovering species would enhance accountability, innovation, and experimentation, as states' roles in pre-listing conservation has shown.

States have already expressed an interest in serving this role. After a two-year initiative to study ways to improve the Endangered Species Act, the Western Governor's Association recently concluded that there should be "greater distinction between the management of threatened versus endangered species in ESA to allow for greater

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<sup>65</sup> 16 U.S.C. § 1533(c)(2).

<sup>66</sup> 16 U.S.C. § 1533(d). Adopting tailored regulations for threatened species would require the U.S. Fish and Wildlife Service to show that some form of take is having a significant adverse effect on the species. Putting this burden on the agency would have the additional benefit of channeling regulation into the areas where it is most needed.

<sup>67</sup> That may sound like a return to the status quo, but it isn't. Under current practice, all take of threatened species, even minor instances of incidental take, is presumptively forbidden. Those restrictions can only be reduced by convincing the Service to adopt a narrower regulation for a species—a discretionary, bureaucratic process that suffers the same costs, delays, and uncertainties that have limited the impact of prior reforms.

management flexibility, including increased authority for species listed as threatened.”<sup>68</sup> This interest is not limited to western states. Gordon Myers, the Executive Director of the North Carolina Wildlife Resources Commission and then-president of the Southeast Association of Fish and Wildlife Agencies, recently testified before a congressional subcommittee that the statute’s two-step process should be restored to give states the flexibility needed to conserve and recover threatened species.<sup>69</sup>

“Congress intended that the states have the opportunity to lead the management of threatened species, including the provision of ‘take’ as a means of conservation of the species. Unfortunately, the [Fish and Wildlife Service] ... promulgated a default rule (50 CFR 17.31) in the mid-1980s that applies all Section 9 restrictions for endangered species also to threatened species unless the Secretary determines otherwise. This essentially eliminated the distinction between the two listing categories.”

### **Going Further: Unleashing States and Conservationists to Convert Endangered Species from a Liability into an Asset**

Although a return to the statute’s two-step approach will not immediately convert rare species from a liability into an asset, it would empower states and conservation groups to move in that direction. Rare species would remain a liability under federal law, with the extent of that liability varying based on whether the species is listed as endangered or threatened. But by improving landowners’ incentives to participate in conservation efforts with states and conservation groups, the ultimate result could be increased importance of state- and environmentalist-led market-based conservation. Consequently, this reform would complement ongoing state efforts to promote more collaborative means of protecting species through positive, market-based incentives.

In 2014, for instance, the Association of Fish and Wildlife Agencies established a Blue Ribbon Panel consisting of business and conservation leaders to design a 21<sup>st</sup> century model for conserving wildlife.<sup>70</sup> The panel’s recommendations have been incorporated into the bipartisan American Wildlife Recovery Act, a proposed bill that would provide increased

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<sup>68</sup> Western Governors’ Association, *Policy Resolution 2017-11: Species Conservation and the Endangered Species Act*, [http://westgov.org/images/editor/2017-11 Species Conservation and the ESA for web.pdf](http://westgov.org/images/editor/2017-11%20Species%20Conservation%20and%20the%20ESA%20for%20web.pdf).

<sup>69</sup> Testimony of Gordon Myers, Exec. Dir. N.C. Wildlife Resources Comm., Pres. Southeast Assoc. of Fish and Wildlife Agencies, Before the Senate Committee on Environment and Public Works, *Oversight: Modernization of the Endangered Species Act* (Feb. 15, 2017), [https://www.epw.senate.gov/public/\\_cache/files/e/6/e6a208cc-6cc8-4503-98d2-8d9a97d9065e/F9D83BCB0EA63DA51B32038D993779E3.testimony-for-gordon-myers-before-senate-epw-15-feb-2017.pdf](https://www.epw.senate.gov/public/_cache/files/e/6/e6a208cc-6cc8-4503-98d2-8d9a97d9065e/F9D83BCB0EA63DA51B32038D993779E3/testimony-for-gordon-myers-before-senate-epw-15-feb-2017.pdf).

<sup>70</sup> Blue Ribbon Panel on Sustaining America’s Diverse Fish and Wildlife Resources, *Final Report and Recommendations* (Mar. 2016), [https://www.fishwildlife.org/application/files/8215/1382/2408/Blue\\_Ribbon\\_Panel\\_Report2.pdf](https://www.fishwildlife.org/application/files/8215/1382/2408/Blue_Ribbon_Panel_Report2.pdf).

funding for state-led innovative conservation efforts from oil and gas revenues.<sup>71</sup> Returning to the Endangered Species Act's two-step approach would make such funding more effective by clearing red tape and increasing landowners' willingness to cooperate.

For the same reason, this reform would also increase the effectiveness of private environmental groups' efforts to promote collaborative conservation. Cooperative efforts between landowners and environmentalists "are the only approaches that are likely to work going forward," according to the Environmental Defense Fund's Eric Holst.<sup>72</sup> Restoring the Endangered Species Act's two-step approach would expand the number of opportunities for environmental groups to partner with states, industry, and landowners to pursue innovative conservation programs. It would also lower the costs of securing landowner participation, by eliminating the federal pre-approval process for threatened species and increasing the willingness of industry and property owners to contribute to the effort.

## Conclusion

Since the Endangered Species Act was enacted, few species protected by it have gone extinct. That's reason for celebration. But we want the statute to do more. We want endangered species to recover as well. Achieving that goal, without sacrificing the law's success at preventing extinction, requires reform that aligns the incentives of private landowners with the interests of rare species while maintaining regulatory protections for endangered species.

Returning to Congress' original two-step approach of connecting the burdens of regulation to the degree of risks species face would accomplish that needed reform. By imposing more onerous burdens as species approach extinction, and relaxing those burdens as they recover, this reform will encourage landowners to conserve and recover species. And by maintaining the same protections for endangered species that exist today, that reform will not come at the expense of the statute's effectiveness at preventing extinction.

Recent voluntary conservation efforts provide powerful evidence that such reform would benefit species. If the incentive realignment created by this reform were reinforced by other public and private incentives to encourage proactive conservation, the benefits would be even greater.

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<sup>71</sup> National Wildlife Foundation, *Recovering America's Wildlife Act*, <https://www.nwf.org/Our-Work/Wildlife-Conservation/Policy/Recovering-Americas-Wildlife-Act>.

<sup>72</sup> Erica Good, *A Shifting Approach to Saving Endangered Species*, N.Y. Times, (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/science/a-shifting-approach-to-saving-endangered-species.html>.

**From:** [Mariagrazia Caminiti](#)  
**To:** [daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov); [jwood@pacificlegal.org](mailto:jwood@pacificlegal.org); [richard.goeken@sol.doi.gov](mailto:richard.goeken@sol.doi.gov); [Mariagrazia Caminiti](#)  
**Subject:** Invitation: J Wood w/Jorjani/Goeken @ Mon Apr 9, 2018 5pm - 5:30pm (EDT) (daniel.jorjani@sol.doi.gov)  
**Date:** Friday, April 6, 2018 6:40:55 PM  
**Attachments:** [invite.ics](#)

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## J Wood w/Jorjani/Goeken

[more details »](#)

When Mon Apr 9, 2018 5pm – 5:30pm Eastern Time

Where SOL 6342 ([map](#))

Video call (b) (5)

Calendar [daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov)

Who

- [marigrace.caminiti@sol.doi.gov](mailto:marigrace.caminiti@sol.doi.gov) - organizer
- [jwood@pacificlegal.org](mailto:jwood@pacificlegal.org)
- [richard.goeken@sol.doi.gov](mailto:richard.goeken@sol.doi.gov)
- [daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov)

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ATTENDEE;CUTYPE=INDIVIDUAL;ROLE=REQ-PARTICIPANT;PARTSTAT=ACCEPTED;RSVP=TRUE;CN=marigrace.caminiti@sol.doi.gov;X-NUM-GUESTS=0:mailto:marigrace.caminiti@sol.doi.gov  
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SEQUENCE:0  
STATUS:CONFIRMED  
SUMMARY:J Wood w/Jorjani/Goeken  
TRANSP:OPAQUE  
END:VEVENT  
END:VCALENDAR

**From:** [Jim Carlson](#)  
**To:** [gregory\\_sheehan@fws.gov](#); [gary\\_frazer@fws.gov](#); [timothy\\_williams@ios.doi.gov](#)  
**Cc:** [stasset@fordcounty.net](#); [edward.keable@sol.doi.gov](#); [Daniel.Jorjani@sol.doi.gov](#); [jeff.chanay@ag.ks.gov](#); [sarah\\_quamme@fws.gov](#); [Jason\\_luginbill@fws.gov](#); [Jonathan Wood](#); [Todd F. Gaziano](#); [Jeffrey W. McCoy](#)  
**Subject:** [EXTERNAL] Local Governments Sue Zinke/USFWS Under Congressional Review Act  
**Date:** Thursday, April 12, 2018 2:22:42 PM  
**Attachments:** [KNRC Press Release USFWS PECE Lawsuit 041118.pdf](#)  
[image003.png](#)

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Dear Director Sheehan, Assistant Director Frazer, and Local Government Liaison Williams -

Attached is a *Press Release* announcing a lawsuit filed by the Kansas Natural Resource Coalition (KNRC) in Federal district court on Wednesday, April 11, 2018.

In this litigation, Pacific Legal Foundation and KNRC have partnered in requesting federal courts to require USFWS to submit the PECE Rule to the Congress.

Developed in 2003, KNRC views the PECE Rule as a positive framework for species conservation under the Endangered Species Act (ESA). In bringing this challenge, we seek to secure congressional assurance that substantial investments in individual and collaborative conservation initiatives will be secure, and that both the human and natural environments will be protected for the long term.

The attached *Press Release* contains helpful links to the KNRC website, the court brief, congressional reports, and other information.

Please feel free to contact Johnathan Wood for legal questions or myself regarding KNRC, as appropriate.



*The Kansas Natural Resource Coalition (KNRC) is an association of counties who maintain collective and participatory involvement in administrative government on behalf of its citizenry. The Coalition serves as a conduit between local, state and federal governments to promote balanced, necessary and effective administrative policymaking through the mechanism of government-to-government coordination. Our mission is to monitor, analyze, understand, communicate, and participate in those initiatives that materially affect the natural or human systems governed by individual member counties.*

April 11, 2018  
For Immediate Release



Kansas Natural Resource Coalition

Bringing Voice and Environmental Decision-making to Local Government

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Policy Analyst: Norm MacLeod – (360) 379-8914  
Lead Attorney: Johnathan Wood – (202) 888-6881

## Press Release

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### KNRC Files Lawsuit Against US Fish & Wildlife Service; Requests PECE Rule to be Remanded to Congress

Wichita, KS -

Today, the Kansas Natural Resource Coalition (KNRC) filed a lawsuit<sup>1</sup> in the United States Federal District Court for the District of Kansas to require agency compliance with the Congressional Review Act of 1996<sup>2</sup>. At issue is the failure of the United States Fish and Wildlife Service (USFWS) to submit its Policy for Evaluation of Conservation Efforts When Making Listing Decisions<sup>3</sup> (PECE) Rule to the Congress for approval as required by federal statute.

Background -

Developed in 2003, the USFWS PECE Rule provides a positive framework for species conservation under the Endangered Species Act (ESA). The PECE specifically encourages states, counties, industry, and property owners to voluntarily collaborate in conservation initiatives, potentially reducing or eliminating altogether the need for federal intervention or listing of species under the ESA.

Despite a clear statutory mandate that agencies submit every new rule for review, Congress was not given the opportunity to evaluate the PECE, potentially subjecting legitimate, effective, and expensive conservation programs to litigatory mischief by environmental groups and non-governmental organizations.

The Congressional Review Act was enacted to address the longstanding problem of federal agencies granting themselves regulatory powers beyond those delegated by Congress. Astonishingly, many federal agencies — not just Department of Interior — have for *years* chosen to ignore the Congressional Review Act requirements when imposing rules on the states, industry, local governments, and the public. The problem is so prolific, that between 2001 and 2009, the Congressional Research Service reports that federal agencies failed to submit more than 1,000 substantive rules to the Congress for consideration.<sup>4</sup>

In this litigation, the Pacific Legal Foundation and KNRC have partnered in requesting federal courts to require USFWS to submit the PECE rule for congressional approval. A favorable ruling will provide predictability for local conservation efforts, and greater certainty for federal administrative processes.

KNRC also hopes this case will set a positive precedent, realigning authority away from the executive and back to the Congress. This case furthers KNRC's position<sup>5</sup> on delegation to agencies.

The Kansas Natural Resource Coalition (KNRC) is an association of counties who maintain collective and participatory involvement in administrative government on behalf of its citizenry. The Coalition serves as a conduit between local, state and federal governments to promote balanced, necessary and effective administrative policymaking through the mechanism of government-to-government coordination. Our mission is to monitor, analyze, understand, communicate, and participate in those initiatives that materially affect the natural or human systems governed by individual member counties.

More Information: <https://pacificlegal.org/asking-agencies-to-follow-the-rules-isnt-asking-too-much/>

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<sup>1</sup> [Kansas Natural Resource Coalition v. Zinke et al.](#)

<sup>2</sup> [5 USC §§ 801 – 808.](#)

<sup>3</sup> [68 Fed. Reg. 15 100. March 28 2003.](#)

<sup>4</sup> [Congressional Review Act: Rules Not Submitted to GAO and Congress. Congressional Research Service. Dec. 29 2009.](#)

<sup>5</sup> [Comprehensive Plan for Reforming the Federal Government and Reducing the Civilian Workforce. KNRC Response to OMB Memo M-17-22.](#)



Regards,

J.R. Carlson

Executive Director

The Kansas Natural Resource Coalition

(620) 260-9169



**From:** [Jim Carlson](#)  
**To:** [Sheehan, Gregory](#); [Andrea Travnicek@ios.doi.gov](#); [Roslyn Sellers@fws.gov](#)  
**Cc:** [stasset@fordcounty.net](#); [Cameron Edwards](#); [Carl Uhrich](#); [David Hubert](#); [Crystal Rucker](#); [Jonathan Wood](#); [daniel.jorjani@sol.doi.gov](#); [noreen\\_walsh@fws.gov](#)  
**Subject:** [EXTERNAL] Black Footed Ferret - 08/15 Amended Meeting Request  
**Date:** Friday, August 10, 2018 9:26:53 AM  
**Attachments:** [USFWS Ltr Edwards to Sheehan 083118.pdf](#)  
[Finding of Fact and Conclusions of Law.pdf](#)

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Dear Mr. Sheehan -

There are reports in the Trade Press that you will be departing your position as Interim Director for USFWS to your native Utah, just days after the August 15 meeting between Logan County Commissioners and the Kansas Natural Resource Coalition (KNRC).

The request from Logan County regarding audit of the Black-Footed Ferret program is important to Logan County, as well as our interest in receiving any reports about the Status Review of the Lesser Prairie Chicken.

For continuity and transition purposes we are requesting that Andrea Travnicek, acting assistant secretary for fish, wildlife and parks or Susan Combs, acting assistant secretary for policy, management and budget be incorporated into the meeting.

I copied Ms. Travnicek and Ms. Sellers on this note and included the original request by Logan County.

Thank you in advance for consideration of our request. I hope the return to Utah is beneficial for your personal wellbeing and career.

J.R. Carlson  
Executive Director  
The Kansas Natural Resource Coalition

-----Original Message-----

From: Crystal Rucker <[lgclerk@st-tel.net](mailto:lgclerk@st-tel.net)>  
Sent: Thursday, August 09, 2018 4:41 PM  
To: 'Sheehan, Gregory' <[greg\\_j\\_sheehan@fws.gov](mailto:greg_j_sheehan@fws.gov)>  
Cc: Cameron Edwards <[camnbec@st-tel.net](mailto:camnbec@st-tel.net)>; Carl Uhrich <[cuhrich@st-tel.net](mailto:cuhrich@st-tel.net)>; David Hubert <[davidhubert21@yahoo.com](mailto:davidhubert21@yahoo.com)>; [stasset@fordcounty.net](mailto:stasset@fordcounty.net); [jcarlson@knrc.org](mailto:jcarlson@knrc.org)  
Subject: Meeting next week with Tassett and Carlson

Good afternoon Mr. Sheehan,

I just wanted to share that Commissioner Edwards, Chairman of the Logan County Commissioners, will be traveling together with Commissioner Tasset and Executive Director Carlson for your meeting next Wednesday at 8:00 a.m.

Thanks so much,  
Crystal

Logan County Clerk  
785-671-4244

-----Original Message-----

From: Sheehan, Gregory [[mailto:greg\\_j\\_sheehan@fws.gov](mailto:greg_j_sheehan@fws.gov)]  
Sent: Thursday, August 02, 2018 5:56 AM  
To: Crystal Rucker <[lgclerk@st-tel.net](mailto:lgclerk@st-tel.net)>; [daniel.jorjani@sol.doi.gov](mailto:daniel.jorjani@sol.doi.gov); Noreen Walsh <[noreen\\_walsh@fws.gov](mailto:noreen_walsh@fws.gov)>  
Subject: Re: [EXTERNAL] Funding Moratorium & Audit Request - Black-Footed Ferret/Kansas

Thank you Crystal.

I have reviewed and advanced to my immediate staff who can research this and learn more. They will get back to me shortly.

Thanks  
Greg

Greg Sheehan  
Principal Deputy Director  
US Fish and Wildlife Service  
202-208-4545 office  
202-676-7675 cell

> On Aug 1, 2018, at 10:31 AM, Crystal Rucker <lgclerk@st-tel net> wrote:

>

> Dear Mr. Sheehan, Jorjani and Others,

>

>

>

> The Logan County Board of County Commissioners is requesting the  
> Service to issue a funding moratorium for government funding of the  
> Black-tailed Prairie Dog program, and conduct an audit effective  
> immediately. The funding opportunity for the ferret program closed  
> last Monday, July 30 and is part of this email note.

>

>

>

> The attached letter and a report from a 2013 Public Hearing by the  
> Kansas Natural Resource Coalition (KNRC) includes specific information  
> documenting our request. Adobe Pages 20 and 21 of the 'ltr' file  
> contain a recent (May 02, 2018) letter from Region 6 to KNRC,  
> responding to "technical and financial audit" request made by KNRC.  
> KNRC Executive Director Carlson said KNRC has not heard from the  
> Service since that letter, and our commission feels this is a good time to look closely at the ferret program.

>

>

>

> The ferret program has been a problem for landholders and our county  
> since the beginning in 2007. The attached report from an  
> on-the-record Public Hearing held by 32 KNRC counties documents the  
> problems with the ferret program. Those references are found on adobe Pages 12 through 16.

>

>

>

> Our board is requesting the Service to partner with us - as local  
> government  
> - in conducting an objective audit of the ferret program. We have lots  
> of data, information, and documentation that could help with this as well.

>

>

>

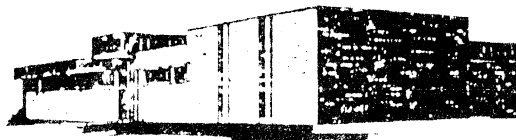
> We understand that Ford County Commissioner and KNRC President Tasset  
> and Mr. Carlson are going to meet with you in a few weeks, and hope  
> that our request for funding moratorium and audit will be a topic of conversation.

>

>

>  
> Respectfully,  
>  
>  
>  
> Crystal Rucker  
>  
> Logan County Clerk  
>  
> Logan County, Kansas  
>  
> (785) 671-4244  
>  
> <Ltr Edwards to Sheehan 073118.pdf>  
> <Finding of Fact and Conclusions of Law.pdf>

# Logan



# County

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**COMMISSIONERS**

785-671-4244; Fax: 785-671-1231  
lgclerk@st-tel.net

710 W. 2<sup>nd</sup> St.  
Oakley, KS 67748

July 31, 2018

Mr. Gregory Sheehan  
Acting Director  
U.S. Fish and Wildlife Service  
1849 C Street NW  
Washington, DC 22040

Mr. Daniel Jorjani  
Acting Solicitor  
U.S. Department of Interior  
1849 C Street, N.W.  
Washington, DC 20240

Mr. Gary Frazer  
Assistant Director for Ecological Services  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Leesburg, VA 20241-3803

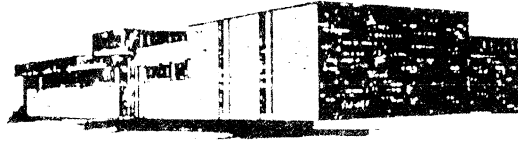
Ms. Noreen Walsh  
Regional Director  
Assistant Regional Director for Ecological Services Program  
U.S. Fish and Wildlife Service  
134 Union Boulevard, Suite 650  
Lakewood, CO 80228

Mr. Michael Thabault  
Assistant Regional Director for Ecological Services Program  
U.S. Fish and Wildlife Service  
134 Union Boulevard, Suite 650  
Lakewood, CO 80228

Mr. Timothy Williams  
Local Government Liaison  
U.S. Department of Interior  
1849 C Street NW  
Washington, DC 20240

Ms. Sarah Quamme  
Chief, Unified Listing Team, Ecological Services Program  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Leesburg, VA 20241-3803

Mr. Jason Luginbill  
Kansas Field Supervisor  
U.S. Fish and Wildlife Service  
2609 Anderson Avenue  
Manhattan, KS 66502



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**COMMISSIONERS**

785-671-4244; Fax: 785-671-1231  
lgclerk@st-tel.net

710 W. 2<sup>nd</sup> St.  
Oakley, KS 67748

July 31, 2018

Re: Request for Decision: Moratorium on Black-tailed Prairie Dog Population and Habitat Monitoring of Black-footed Ferret, Department of Interior Fish and Wildlife Service Funding Opportunity F18AS00260; OMB Control Number 1018-0100

Dear Acting Director Sheehan and Acting Solicitor Jorjani:

I write as the chairman of the Logan County, Kansas Board of County Commissioners (BOCC) to request that you delay your funding decision for the above-referenced funding opportunity, and that you perform a financial audit of the Black-tailed Prairie Dog/Black-footed ferret (BFF) program in Logan County, Kansas. This request reiterates a previous request by the Kansas Natural Resource Coalition (KNRC), of which this county is a member.

As you are aware, our Board has a longstanding history of opposition to the Black-footed ferret introduction, and recovery efforts for the ESA-listed BFF since the 2007 program inception. It is difficult to characterize the breadth and scope of the challenges we as local government have experienced throughout the BFF program. These include, but are not limited to:

- Interference with the discharge of our responsibilities under the mandates of K.S.A. 80-1201, 1202, 1203, and those of affected townships for the same plus K.S.A. 80-1204, 1205, 1206, and 1207, and creating liabilities for these government entities under the mandate of K.S.A. 80-1208.
- Misrepresentation of impacts to neighboring agricultural properties and operations.
- Significant and ongoing damage to properties adjacent proximal to the Haverfield/Barnhardt/Blank site caused by expanding, uncontrolled prairie dog populations beyond the project boundaries.
- Wholly inadequate prairie dog control at and beyond the boundaries of the Haverfield/Barnhardt/Blank site.
- Violations of the terms of your program's ESA § 10(a) permit.
- USFWS staff and leadership nonresponsiveness to repeated requests that our Board be notified prior to release of captive-raised ferrets on the Haverfield/Barnhardt/Blank site.

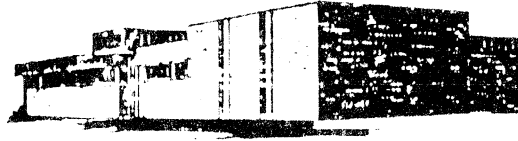
In 2013, as part of a formal public hearing on the proposed listing of the Lesser Prairie-Chicken, the Kansas Natural Resource Coalition (KNRC) documented many issues present in the Black-footed program. I very much encourage you and your staff to a report from that public hearing.<sup>1</sup>

We recently became aware of an agency grant funding opportunity for Black-tailed prairie dog population and habitat monitoring of Black-footed ferret (Funding Opportunity Number F18AS00260, posted July 23, 2018, closed July 30, 2018). This was posted with the caveat that it was for a single-source recipient, *Prairie Wildlife Research*.

---

<sup>1</sup> Finding of Fact and Conclusions of Law. In Re: *The Advisability of Listing the Lesser Prairie Chicken as a Threatened Species under the Endangered Species Act*. The Kansas Natural Resource Coalition. January 29, 2014. Pps 8-11.

# Logan



# County

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## COMMISSIONERS

785-671-4244; Fax: 785-671-1231

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Oakley, KS 67748

Even if there were another qualified research entity, there would not have been time for them to apply, since the estimated time required to fill out the application, according to the full notice of funding opportunity (NOFO), is forty hours, and the time between the opportunity opening and closing would not have allowed for an interested entity to adequately evaluate and apply for the grant.

We believe that the noncompetitive nature of this grant is inappropriate. We realize that your field employees may be comfortable with the people from *Prairie Wildlife Research*, but this does not mean that the organization is the best possible contractor for the project. There may be research entities who are as well-qualified, if not more qualified than the one you are planning to reward with a non-compete grant of \$50,000.00.

Therefore, we request that you place the decision-making process for this grant on hold, announce it as a competitive funding opportunity, and provide sufficient time for interested qualified research entities to evaluate and apply for the opportunity to win one or more of the five (5) \$10,000.00 grant awards noted in the NOFO.

The NOFO is incomplete in its project narrative, in part because there is no mention of what we understand to be the ongoing need to introduce captive-bred Black-footed ferrets to keep the ferret population from extinction. We find this omission concerning in terms of the integrity and scientific objectivity supposed to be part of the project. This causes us not to share your apparent confidence in your apparently favored choice of grant recipient. Our confidence is further eroded by the statement in the narrative, “. . . and to make decisions regarding whether the existing wild ferret population should be augmented with captive reared animals,” given our understanding that this decision has not only been made but acted upon.

Issuance of Funding Opportunity Number F18AS00260 as a single source grant to *Prairie Wildlife Research* adds justification as why we are now requesting that you conduct an audit of your Black-footed ferret program in Logan County for the period beginning with 2007, on-the-ground inception of the program. We request that this audit be conducted with the full participation of the Department of the Interior Inspector General, the Solicitor of the Department of the Interior, and the Department of the Interior Office of Audits, Inspections, and Evaluations, and that the audit have two integrated components:

- A performance audit covering all non-financial aspects of the program, with particular additional attention to risk management and actual impacts in regard to adjoining and neighboring properties and work performed on those properties on behalf of non-project landowners.
- A financial audit of all planning and operational aspects of the program. This needs to include an overall per-ferret total cost for the current ferret population in the project.

The audit should include a cost-benefit analysis, and recommendations for the future of the program, with termination of the project to be included as one of the evaluated recommendation options.

# Logan



# County

---

**COMMISSIONERS**

785-671-4244; Fax: 785-671-1231

lgclerk@st-tel.net

710 W. 2<sup>nd</sup> St.  
Oakley, KS 67748

We believe that you will find that the ferret program at the Haverfield/Barnhardt/Blank site is impaired by deficient scientific integrity, inadequate compliance with federal and state protocols, inadequate stewardship of federal taxpayer funds, and what our Board believes to be other characteristics of a dysfunctional publicly-funded project.

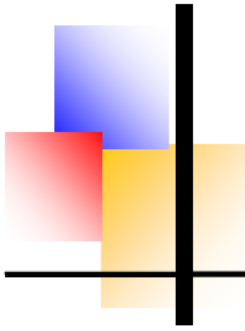
Regards,

Cameron Edwards  
Chair, Logan County Commission  
Logan County, Kansas

Cc:

President D. Trump v. OMB  
Hon Senator P. Roberts  
Hon Senator J. Moran  
Hon. Congressman R. Bishop, House NR Committee  
D. Schmidt – Attorney General – KS  
Mary Kendall - DOE/IG  
S. Tasset - KNRC  
J. R. Carlson - KNRC





# **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

of  
The Kansas Natural Resource Coalition

*In Re:  
The Advisability Of Listing The Lesser Prairie Chicken  
as a  
Threatened Species Under The Endangered Species Act*

January 29, 2014

Ken J. Klemm  
President  
Commissioner, Sherman County

Mahlon Tuttle  
Vice President  
Commissioner, Gove County

Teresa Harder  
Commissioner, Morton County

J. R. Carlson  
Executive Director

Nikki Schwerdferger  
Commissioner, Hamilton County

Fred Kelly Grant  
Hearing Officer

*In Re:*  
*The Advisability of Listing the Lesser Prairie Chicken  
as a Threatened Species under the Endangered Species Act*

<u>Hearing Date:</u>	November 7 and 8, 2013
<u>Hearing Location:</u>	Clarion Hotel 1911 East Kansas Avenue, Garden City, KS 67846
<u>Hearing Officer:</u>	Fred Kelly Grant
<u>Hearing Council:</u>	Ken J. Klemm Mahlon Tuttle Teresa Harder Nikki Schwerdferger
<u>Court Reporter:</u>	Lee Ann Bates, CSR, RPR, CRR Advanced Court Reporting Services PO Box 1872 Hutchinson, KS 67504-1872

The Hearing Council of the Kansas Natural Resource Coalition examined if the public record, expert testimony, science, information, studies and the Listing Proposal by the United States Fish and Wildlife Service itself contain sufficient evidence to conclude listing the Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) as a Threatened Species under the Endangered Species Act (ESA) is advisable and necessary for its continued existence, viability and preservation.

Because ESA is not a stand-alone mandate, preservation of the Lesser Prairie Chicken must take place in the context of and with reasonable consideration for human environments, economic systems and local culture.

For reasons presented in this report, the Hearing Council concludes the USFWS Listing Proposal does not present science supportive of the listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure survival, preservation and viability of the species.

The Hearing Council further concludes minimum standards that evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met.

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## **PUBLIC HEARING PARTICIPANTS**

Carl Uhrich	Logan County Commissioner
Sheila Ellis	Research Analyst, Landholder
Keith Edwards	Farmer, Rancher adjacent to ferret release site in Logan County
Kyle Hoffman	Kansas State House of Representatives, Vice Chair House Agricultural Natural Resource Committee
Cameron Edwards	Farmer, Rancher adjacent to ferret release site in Logan County
James Carlson	KNRC Executive Director; Engineer; Environmental Policy and Technical Expert
Keith Sexson	Assistant Secretary, Kansas Department of Wildlife, Parks and Tourism; State Director, Western Area Fish and Wildlife Association
Jim Pitman	Vice Chair Western Area Fish and Wildlife Association; Small Game Coordinator, Kansas Department of Wildlife, Parks and Tourism;
Mike Lewis	Hamilton County Commissioner
Bruce Graham	CEO, Kansas Electric Cooperatives, Inc.
Don Hineman	Kansas State Representative, District 118
Nikki Schwerdfeger	Hamilton County Commissioner
Clint Pearson	Farm Manager, Banker, Rancher
Jillane Hixson	Rancher, Farmer, Conservation Easement Holder
Val Emick	Rancher, Farmer, Conservation Easement Holder
Lynn Freese	Director of Member Services - Wheatland Electric Cooperative
Kirk Thompson	General Manager - CMS Electric Cooperative, Inc.
Ken Klemm	Sherman County Commissioner
Paul Reynolds	Manager of Environment - Sunflower Electric Power Corp.
Nicole Dick	Professor of Mathematics and Statistics - Garden City Community College
Robert Zink, PhD	Breckenridge Chair in Ornithology, Bell Museum; Professor of Ecology, Evolution, and Behavior, University of Minnesota
Norman MacLeod	Land, Water & Endangered Species Consultant; Former Executive Director at Environmental Sciences Independent Peer Review Institute
Ralph Ostmeyer	Kansas State Senator - District 40
Larry Powell	Kansas State Senator - District 39

## GENERAL

1. On December 11, 2012 the United States Fish and Wildlife Service (USFWS) proposed to list the Lesser Prairie Chicken (LPC) as a Threatened Species under the Endangered Species Act (ESA). In subsequent Federal Register Notifications, USFWS has proposed a special 4(d) Rule under Section 4 of the ESA.
2. Implementation of the Lesser Prairie Chicken Listing Proposal and 4(d) Rule would take place through a three pronged system; the 5 State Rangewide Conservation Plan by Western Area Fish and Wildlife Agencies (WAFWA) proposes to create a demand system, deriving mitigation revenue for administration of Lesser Prairie Chicken conservation programs from utilities, energy, wind producers, agriculture, local government and others implicated for habitat impacts. Mitigation monies collected from impact activities are then proposed to purchase (supply) conservation habitat throughout the region occupied by the Lesser Prairie Chicken.
3. The second and third prongs of the USFWS Listing Proposal implements policies from the Natural Resources Conservation Service (NRCS)/USFWS Conference Opinion and Biological Opinion process; that is US Department of Agriculture (USDA)/NRCS programs will be modified to levy requirements on private land for those participating in habitat, farm and other federal NRCS economic-incentive programs. Because a large portion of Kansas farmers and ranchers participate in federal programs, NRCS Conservation Practices 645 and 528 will affect a significant portion of private lands.
4. The 32 County Kansas Natural Resource Coalition (KNRC) prepared and adopted into local ordinances a *Natural Resource Coordination Plan* and *Lesser Prairie Chicken Conservation, Study and Management Plan*. The KNRC Coordination Plan contains as its basis Federal statutes, regulations, and Executive Orders (EO), and the Coalition relies on the extensive federal record as foundation for coordination, environmental procedure, due process and facts provided in this Finding of Fact and Conclusions of Law document.
5. KNRC's basis for expecting coordination during the Lesser Prairie Chicken Listing Proposal is derived from the Endangered Species Act Section 4(b) which requires the Secretary of Interior to "*take into account conservation efforts by political subdivisions of states,*" and the Federal Land Policy and Management Act (FLPMA) Section 1712(c)(9) requiring consistency with local plans.
6. The *Lesser Prairie Chicken Conservation, Management and Study Plan* prepared by KNRC contains viable, low cost, scientifically sound and ongoing conservation practices for the Lesser Prairie Chicken, including a process to fill data gaps and technical uncertainties in the scientific record.

7. Application of the authorities in the KNRC *Conservation and Coordination Plans* is based on the Tenth Amendment police power of the United States Constitution empowering local government to protect public safety, health and welfare. Local governments have a duty to guard against damage to the economic stability and the social cohesiveness of the communities they serve.

## **BACKGROUND**

### *The Kansas Natural Resource Coalition (KNRC) -*

8. KNRC is a coalition of 32 Western Kansas counties that have real and material interest in the proposal to list the Lesser Prairie Chicken as a threatened species under ESA. Since its inception and the December 11, 2012 proposal by USFWS, KNRC has been actively engaged in the process of coordination through its Lesser Prairie Chicken Conservation, Study and Management Plan.

9. The mission of the KNRC is:

*The Kansas Natural Resource Coalition (KNRC) is an association of counties who maintain collective and participatory involvement in administrative government on behalf of its citizenry. The coalition serves as a conduit between local, state and federal governments to promote balanced, necessary and effective administrative policymaking. The KNRC mission includes monitoring, analyzing, understanding, communicating and participating in those initiatives that materially affect the natural or human systems governed by individual member counties.*

### *Approach -*

10. Background documents of the Coalition's Lesser Prairie Chicken conservation efforts have been made available to KNRC members and USFWS through correspondence, filings to the public record, data transmittals, verbal communications, and coordination meetings. KNRC's detailed knowledge of the technical issues, conservation requirements, historical context, policy initiatives, and statutory/executive requirements surrounding the Lesser Prairie Chicken all coalesce in the Public Hearing process and the Coalition's Finding of Fact and Conclusions of Law.
11. A Public Hearing was held on November 7 and 8, 2013 to receive, review and evaluate available information pertaining to the proposed Lesser Prairie Chicken listing and establish compliance of USFWS with congressional acts, presidential EOs, federal and state regulations, sound scientific principals, economic considerations, cultural and civic impacts, good environmental practice and established Plans.

12. As part of the Public Hearing and information-review process, KNRC considered the historical context, relationships of USFWS with local government and communities, the availability, accuracy, quality and thoroughness of technical information, scope of the listing approach, and necessity for ESA protections in light of existing conservation and regulatory programs. Based upon the established record, incomplete or missing studies, and testimony presented, the hearing council weighed the efficacy of the Listing Proposal against potential impacts to economic stability, social cohesiveness, diminution of private property values, and potential conservation deficits in state and local plans.

*Criteria for Evaluation of Listing Proposal -*

13. Criteria used to guide the Public Hearing and prepare this Finding of Fact document include:
- Do statutory requirements exist for USFWS to attempt consistency with the Coalitions' *Lesser Prairie Chicken Conservation, Management, and Study Plan*?
  - Are there Regulatory, Statutory and/or Executive laws requiring USFWS to perform cultural and socioeconomic analysis in conjunction with, in preparation for, or as part of the USFWS Threatened Listing Proposal for the Lesser Prairie Chicken?
  - Is there sufficient evidence in the public record, from testimony, and in the experience of KNRC Hearing Council to conclude the USFWS Lesser Prairie Chicken Listing Proposal is a *Major Federal Action* as defined by National Environmental Policy Act (NEPA) and Regulations by the Council on Environmental Quality (CEQ)?
  - Does the USFWS Listing Proposal and 4(d) Rule demonstrate the means and measures necessary to create, balance and maintain harmonic conditions between the existing human environment and conservation requirements of the Lesser Prairie Chicken?
  - Is the October 23, 2013 endorsement of the WAFWA Rangewide Plan by USFWS considered a *Major Federal Action*?
  - Is there sufficient information in the public record, correspondence, and from testimony to conclude participation by Kansas Department of Wildlife Parks and Tourism (KDWPT) is a Cooperating Agency with USFWS in development of the WAFWA Rangewide Plan?
  - Is there sufficient information in the public record, correspondence and from testimony to conclude participation by USDA/NRCS is a Cooperating Agency with USFWS through its participation in preparation of Conference/Biological Opinions?
  - Does a Regulatory, Statutory and/or Executive-Order basis exist requiring USFWS, KDWPT and NRCS to coordinate efforts, initiatives, activities and other *Major Federal Actions* with individual KNRC members prior to initiation of such action?



- Based upon the elements contained in the KNRC Coordination Plan, Exhibits and Testimony from the Public Hearing and its own experience, can KNRC conclude USFWS has failed in the requirement to coordinate the Lesser Prairie Chicken threatened-listing proposal with local government?
- Is there evidence to conclude any failure by USFWS to coordinate its actions with KNRC members in the Lesser Prairie Chicken listing process may be knowing, willful and deliberate?
- The Endangered Species Act, Section 4(b)(1)(A) BASIS FOR DETERMINATIONS, provides:

*“The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.”*

- Is there evidence in the public record and from testimony at the Public Hearing to conclude USFWS has taken “into account” the *Lesser Prairie Chicken Conservation, Management, and Study Plan* and the efforts by local government in its Listing Proposal?
- Have the potential economic, cultural or property impacts stemming from potential implementation of the WAFWA 5 State Plan or NRCS Conservation Practices 645 or 528 been reasonably evaluated, made available for consideration and is the technical basis for them warranted?
- Does a sufficient technical record exist to conclude a “*Threatened*” Determination of the Lesser Prairie Chicken over its 5-State Range due to historical, ongoing, and probable future impact of cumulative habitat loss and fragmentation resulting from conversion of grasslands to agricultural use, encroachment by invasive woody plants, wind energy, development, petroleum production, presence of roads and manmade vertical structures including tower, utility lines, fences, turbines, wells and buildings?
- Does the body of information, evidence, exhibits and testimony from the Public Hearing provide sound basis to conclude the existence or future of the Lesser Prairie Chicken is threatened due to: habitat destruction, modification, or curtailment; the species or its habitat is over utilized for commercial, recreational, scientific or educational purposes; the species is particularly vulnerable or affected by disease or predation; existing state or federal conservation programs are not adequate or sufficient to ensure the existence of the Lesser Prairie Chicken?
- Has a reasonable range of unintended private property take consequences from implementation of the WAFWA Rangewide Plan or NRCS Conservation Practices 645 and 528 been made available to local government?

## COORDINATION HISTORY; NOTIFICATION

14. On August 23, 2013 KNRC transmitted its *Natural Resource Coordination Plan* and *Lesser Prairie Chicken Conservation, Management and Study Plan* throughout the US Departments of Interior, Commerce, Agriculture and to senior leadership of USFWS in Regions 2 and 6.
15. The KNRC Coordination Plan, adopted into local ordinances of all 32 KNRC Counties, provides the foundation for local governments to call for meaningful participation in Major Federal Actions at the onset of Major Federal Action; the Coordination Plan is a compilation of federal statutes, EOs and regulations that require assessment and balancing of natural and human environments and meaningful coordination with local government on those Major Actions that concern them.
16. Mr. James Carlson, environmental policy expert, engineer, and Executive Director for the Kansas Natural Resource Coalition testified that on September 11, 2013, coordination was formally and personally invoked with USFWS Deputy Director of Endangered Species Paul Souza and Department of Interior (DOI) Counselor to Assistant Secretary Michael Bean. During that Coordination Meeting, both Mr. Souza and Mr. Bean were given Notice of the November 7 and 8, 2013 KNRC Public Hearing.
17. Mr. Carlson testified he and President Klemm reviewed in detail with USFWS the elements from the KNRC Coordination and Conservation Plans, as well as EOs and coordination requirements found in the Federal Land Policy and Management Act. During that meeting the requirement to achieve consistency with the KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan* was established.
18. Mr. Carlson testified he specifically drew attention to the requirements of US Department of Interior Agencies to coordinate in EO 13352 and the need for a Regulatory Impact Analysis in EO 12291.
19. Mr. Carlson testified USFWS was “*nearly to completely disinterested in the coordination and conservation plans we had presented,*” and that USFWS pointed KNRC to the WAFWA Rangewide Plan.
20. At the Public Hearing Mr. Carlson pointed out WAFWA is quasi-governmental organization, and the WAFWA Rangewide Plan would be a collaboration of non-elected officials, testimony corroborated by Commissioner Ken Klemm.

21. Mr. Carlson testified Section 4 of the Endangered Species Act requires the Secretary of Interior to “take into account,” which means to weigh and contemplate carefully the conservation measures by local government prior to making a determination under Section 4 of the Endangered Species Act.
22. Mr. Carlson testified in making its listing notification, USFWS had not coordinated whatsoever with local government.
23. Kansas State Representatives Hoffman, Hineman and Kansas State Senators Powell and Ostmeyer testified USFWS had not coordinated with their committees or the State Legislature. In his concluding remarks, Senator Powell stated:

*“Unlike the Fish and Wildlife Service, the Coalition of Counties has coordinated its work and efforts extensively with me, with my [Senate Natural Resource] committee, and with the Legislative and Executive branches of our State Government. They [KNRC] have engaged in coordination with the [USFWS] Federal Agency, but the Coalition reports that the Service has not followed through with any meaningful discussions.”*

24. Mr. Carlson testified commissioners from 16 KNRC Counties signed affidavits stating that USFWS has not notified them of the Lesser Prairie Chicken Listing Proposal nor contacted them at any point during the Listing Process; this testimony was corroborated by Commissioner Klemm, who shared the steering committee had a 100% return rate of all affidavits randomly distributed to 16 of the 32 KNRC counties.
25. At the November 1, Coordination Meeting Number 2, Heather Whitlaw, Supervisor of the Kansas USFWS Field Office, refused to discuss how the Service is “taking into account” the KNRC Plans, and she was unwilling – at the direction of the Department of Interior Solicitor – to describe how USFWS is attempting consistency between the endorsed WAFWA Rangewide Plan and the Coalition’s *Lesser Prairie Chicken Conservation, Management and Study Plan*. Her response was simply to read a prepared statement:

*“...language was that she [Solicitor Jacobsen] cannot agree with the Coalition’s interpretation of federal authorities and feels that the project leaders/staff person, such as myself, is not prepared to debate this today.”*

26. The October 18, 2013 agenda calling Coordination Meeting Number 2 specifically requested USFWS to send “*delegates who have the latitude, position and authority to speak for USFWS on regional policy, technical and Lesser Prairie Chicken issues that will be discussed.*”

27. Ms. Heather Whitlaw, Field Supervisor of the Kansas Field Office was the only USFWS representative sent to the November 1, 2013 Coordination Meeting Number 2.
28. On November 7 and 8, 2013, KNRC held the Public Hearing to which both Ms. Whitlaw and Dana Jacobsen, Assistant Regional Solicitor Rocky Mountain Region for Department of Interior, refused repeated invitations. In written correspondence Ms. Whitlaw stated the Public Hearing is “*not the right forum for discussions*” of conservation plans.
29. Solicitor Jacobsen refused attendance at the KNRC Public Hearing due to “budget constraints” and “other commitments,” despite several public notifications and personal requests for attendance; no USFWS personnel attended the Public Hearing held by representatives of 32 counties of local government.
30. In correspondence following the November 1, 2013 Coordination Meeting, USFWS Solicitor Jacobsen and Director Ashe were specifically requested to attend the Public Hearing and give testimony and rationale behind USFWS disagreement with the Federal Statutes, EOs and CEQ Regulations presented in the KNRC *Natural Resource Coordination Plan*.
31. USFWS has refused to respond to written and verbal requests to coordinate with local government by non-attendance at the November 7 and 8, 2013 Public Hearing on the Lesser Prairie Chicken Listing Proposal.
32. As of the close of the Public Hearing process, USFWS has ignored repeated verbal and written requests to attempt consistency with the *Lesser Prairie Chicken Conservation, Management and Study Plan* and has provided no comments, questions or feed back on that document.
33. Sheila Ellis, Research Analyst, farmer and ranch owner, testified Logan County, Kansas did not receive early notification on the Lesser Prairie Chicken Listing Proposal and 4(d) Rule despite resolutions and notification requests.
34. Between May and November 2009, 38 Kansas counties in addition to Logan County, adopted and provided resolutions to USFWS specifically invoking coordination and notification rights prior to any Major Federal Action.
35. None of the 39 Kansas counties who invoked coordination were notified of USFWS’s intent to list the Lesser Prairie Chicken as a Threatened Species before publication of the Listing Notification in the December 11, 2012 Federal Register.
36. Logan County did not receive notification of USFWS’s intent to list the Lesser Prairie Chicken as a Threatened Species prior to publication of the Listing Notification in the December 11, 2012 Federal Register.

37. On October 26, 2012 at Logan County Coordination Meeting Number 6, USFWS Assistant Regional Director Thabault was specifically asked by Commissioner Uhrich about the Lesser Prairie Chicken, to which Mr. Thabault replied:

*“...we [USFWS] were under that settlement agreement obliged to either issue a proposed rule or withdraw the listing in September. Uh, we were not able to comply with that date and we got a, uh, uh, some waiver from the court and we are now obliged to make some sort of determination, just shortly before the end of November. So, we will either publish a proposed rule to list the species or we will withdraw the species from the candidate list; those are the two decisions points we have before us. So no proposal’s been put out yet.”*

38. The Lesser Prairie Chicken Listing Notification was published in the Federal Register on December 11, 2012.

*Previous USFWS Activities -*

39. Commissioner Carl Uhrich of Logan County gave testimony that both the Kansas and Region 6 Offices of USFWS understand the Federal requirement to coordinate with local government; Logan County has sent “many” letters to USFWS calling coordination meetings and the Service has not denied the applicability of coordination or participation in coordination efforts on releases of Black-footed Ferrets in the county.
40. Commissioner Uhrich testified, “*USFWS will coordinate but not cooperate.*”
41. On November 19, 2007, Logan County adopted Resolution No. 07-11 invoking its right as local government to Coordinate and be notified prior to introduction of endangered species, including Black-footed Ferrets; USFWS was subsequently made aware of that resolution. Sheila Ellis testified that since the Logan County resolution, USFWS has repeatedly introduced Black-footed Ferrets at the Haverfield/Logan County release site without notification or explanation to local government. In some cases, Black-footed Ferret introductions came to light through the local press, placing the Logan County Commissioners in an awkward position with their constituents.
42. Introduction of the Black-footed Ferret at the Haverfield/Logan County release sites brought immediate conflict with local residents and litigation with the Logan County Commission. Local residents believe infestation and proliferation of Prairie Dogs, the primary food source of the Black-footed Ferret, to be incompatible with agriculture, ranching, property values, human safety and Kansas statutes which require local governments to eradicate all Prairie Dog populations on private lands.

43. A central issue with the introduction of the Black-footed Ferret is control of Prairie Dog infestations along the perimeter boundaries such that Prairie Dog infestations do not propagate and impact neighboring properties.
44. Commissioner Uhrich testified over time 150 Black-footed Ferrets have been released in Logan County, and published 2013 counts record a current population of 11 Black-footed Ferrets. The to-date cost of the Logan County Black-footed Ferret recovery program to the American taxpayer was stated to be approximately one million dollars. Corroborative testimony by Ms. Ellis put rangewide expenditures for the Black-footed Ferret program between 1981 and 2012 at \$30 million.
45. Mrs. Ellis testified the Haverfield/Logan County release site was selected for introduction because plague has decimated Black-footed Ferret populations at the South Dakota introduction sites and recent South Dakota Black-footed Ferret counts at that site have declined, due to plague, from 350 to 72.
46. Keith Edwards, a 5<sup>th</sup> generation farmer and rancher who manages a 7 mile contiguous boundary with the Haverfield/Logan County release site questioned the genetic diversity of Black-footed Ferret populations released in Logan County, stating the ferrets are a result of line breeding from 16 DNA sources.
47. On October 15, 2009, then USFWS Field Office Supervisor Mike LeValley admitted on the record to knowingly and willfully violating the Logan County Notification Resolution by scheduling and performing Black-footed Ferret releases on the Haverfield/Logan County release site.
48. Requests to USFWS under the Data Quality Act for verification of the historical range of the Black-footed Ferret resulted in USFWS producing documentation of a ferret skull specimen, purportedly a dead pet originating from Gove County brought into a tavern in Logan County.
49. To date, USFWS has produced no credible scientific information in support of its claim the Black-footed Ferret once occupied the range within Logan County.
50. During coordination meetings held on April 4, 2012 and October 26, 2012, Logan County Commissioners were misled by on-the-record statements of USFWS Assistant Regional Director Thabault and Kansas Field Supervisor LeValley as to future planning for Black-footed Ferret releases in the historical purported range. Black-footed Ferret Safe Harbor Agreement (BFFSHA) documents released on December 19, 2012 reveal scoping began on March 13, 2012 and a September 12, 2012 final signature on a Memorandum of Understanding for the BFFSHA contradict the on-the-record statements given by Mr. Thabault and Mr. LeValley as to knowledge of plans and release activities.



51. Mrs. Ellis testified USFWS was unwilling to establish baseline Prairie Dog population counts along perimeter properties surrounding the Haverfield/Logan County introduction sites because of the “*unavailability*” of data. The message was USFWS was under no obligation to establish, monitor, or track changes in Prairie Dog populations on properties adjacent to the Haverfield/Logan County sites such that impact to neighboring properties could be gauged, monitored, and its impacts understood.
52. In public meetings, coordination meetings, public documents and its Environmental Assessment for the Black-footed Ferret introduction, USFWS characterized the project as “*experimental*” with a finite, 5-year duration. Classification of the Black-footed Ferret introduction as experimental was coupled with public assurances by USFWS to neighboring landholders and correspondence with Kansas US Representative Moran that ranching activities on adjacent properties would not be restricted and if “*problems arise that cannot be resolved*” with the Black-footed Ferret introduction project USFWS was prepared to terminate and “*take its ferrets and go home.*”
53. When USFWS issued itself an Endangered Species Permit for introduction of the Black-footed Ferret, the permit was classified under Section 10(a) (Recovery) instead of Section 10(j) (Non-essential Experimental Population.) Throughout the permitting and introduction process, USFWS misrepresented to the Logan County Commissioners, Landholders, and the public at large the nature and intent of the Black-footed Ferret introduction program.
54. The Section 10(a) ESA permit for recovery of the Black-footed Ferret expired on December 31, 2012 and USFWS has not opened up the permit renewal for public comment in the Federal Register.
55. The Black-footed Ferret recovery program in Logan County, Kansas is currently taking place under the authority of an expired Endangered Species Act permit.
56. Keith Edwards testified rapid, prolific infestation of Prairie Dogs coupled with newly placed chemical (Rozol and Phostoxin) restrictions encumbered landholders’ ability to control Prairie Dog populations when they are particularly active and reproduction rates high. The chemical restrictions were imposed despite USFWS commitments to local property owners that longstanding management and ranching practices would be unaffected by Black-footed Ferret introductions.



57. Prairie Dog chemical restrictions placed on neighboring land holders combined with escalating Prairie Dog infestations translated into substantial and documented proliferation on farms and ranches “*miles*” away from the Haverfield Black-footed Ferret introduction site. Impacts to the Edwards’ property include increased labor for Prairie Dog control, expenditures for chemicals, lost revenue from decreased pasture usage, and reduced stocking rates. The Black-footed Ferret introductions and subsequent Prairie Dog infestations have resulted in increased safety risks from rattlesnakes that accompany Prairie Dog towns.
58. The increased rattlesnake risk was corroborated by Commissioner Uhrich, who recounted a recent, near-fatal instance where a boy was bitten by a rattlesnake in the newly Prairie Dog infested area.
59. Direct ranch operating losses incurred by the Edwards operations were stated to be in excess of \$160,000.
60. Increased Logan County expenditures directly attributable to the USFWS Black-footed Ferret release program is \$167,089.59.
61. Keith Edwards produced photographs of Prairie Dog infestations three miles from the Haverfield/Logan County release site.
62. Mrs. Ellis testified that “*miles and miles*” of property in a concentric circle beyond the Black-footed Ferret introduction site have been impacted by expanding and increasingly uncontrolled Prairie Dog infestations; a situation complicated by recent chemical restrictions placed on landholders.
63. Black-footed Ferret introductions at the Haverfield/Logan County release site have resulted in demonstrated property damage, forced cuts in stocking rates, reductions in land valuations, increased costs for rodent control and lost tax revenue to Logan County.
64. Testimony by Commissioner Uhrich and Mrs. Ellis recount how the James Ludolph property abutting the Haverfield introduction site has been deemed “*valueless*.”
65. Mr. Ludolph holds land that is repeatedly infested by uncontrolled Prairie Dogs from the Haverfield Complex; he is currently unable to make productive use of his property because crop losses will complicate crop insurability across the remainder of his farming operation. Mr. Ludolph has reduced stocking rates on the affected property by as much as 75% and his land is becoming increasingly unproductive.
66. Commissioner Uhrich and Mrs. Ellis testified that Mr. Ludolph has stopped farming altogether on the abutting parcel because Prairie Dogs consume crops faster than he can grow them.

67. Reclamation costs to restore Mr. Ludolph's land to pre-ferret conditions are estimated at \$410,000.
68. Mr. Ludolph retains tax liability for land that is increasingly non-productive and "valueless."
69. Increased chemical restrictions, ineffective buffer zones for Prairie Dog control, lack of baseline monitoring for Prairie Dogs on neighboring properties, and substantive, increased risks of rattle snakes have compromised the safety, productivity, and property values of Logan County landholders adjacent to the Black-footed Ferret introduction sites.
70. Throughout the Black-footed Ferret introduction project, USFWS has failed to respond to data requests, reasonable baseline monitoring, effective prairie dog buffer zone control and legitimate public safety concerns. Further, the record indicates by not examining the human related consequences prior to Black-footed Ferret introduction, diminution of private property values and other human-related impacts remain unaccounted for.
71. The total estimated expenses, value diminution, crop losses, livestock impacts, and reduced stocking rates for those giving testimony of Black-footed Ferret introductions is \$4,217,360.82.

## **SCIENCE, DATA, AND TECHNICAL CONSIDERATIONS**

72. The KNRC Hearing Council received testimony from national technical experts, statisticians, environmental policy experts and conservationists on the scientific methodology, interpretations, availability, accuracy and completeness of the body of science used by USFWS to support the Lesser Prairie Chicken Listing Proposal.
73. The Hearing Council weighed testimony in the context of its own *Natural Resource Coordination Plan* and *Lesser Prairie Chicken Conservation Management and Study Plan*, the public record, and its knowledge of the facts.
74. The KNRC Hearing Council received and weighed a body of testimony, evidence, information, data, and conclusions against the standards binding the Secretary of the Interior in Section 4(a) of the Endangered Species Act that require the Secretary of the Interior to demonstrate - through science - the evidence supports the Lesser Prairie Chicken is threatened throughout its range and is in need of Federal listing protection:
  - 1) the present or threatened destruction, modification, or curtailment of its habitat or range;
  - 2) overutilization for commercial, recreational, scientific, or educational purposes;

- 3) disease or predation;
  - 4) the inadequacy of existing regulatory mechanisms;
  - 5) other natural or manmade factors affecting its continued existence.
75. The Hearing Council received information and testimony in consideration of the effects of climate change, disease, elevated structures, population trends, impacts of electrical transmission/distribution lines and sound emanating from oil and gas exploration, maintenance and operations; the hearing council then assessed whether genetic variation of the Lesser Prairie Chicken is normal and sufficient to survive current stressors, and the sufficiency of existing parcels and programs to sustain populations.
  76. Mr. Norman MacLeod, Natural Resource Policy expert on endangered species and former Executive Director of Environmental Sciences Independent Peer Review Institute testified the term “science,” as defined and used in the Endangered Species Act, excludes consideration of items that are not “science.”
  77. The term “Best Available Science” suggests that some information is Best and other information is not; that science implicitly holds to a standard of measure.
  78. The Coalition defines “best available science,” in its Natural Resource Coordination Plan, Appendix D, page D-1, as *“that body of reproducible and credible data, information, and studies that are collectively available to the average person under normal circumstances.”*
  79. Dr. Robert Zink, Chair of Ornithology and Professor of Ecology, Evolution and Behavior at the University of Minnesota testified that Lesser Prairie Chicken populations have demonstrated throughout history remarkable up and down population trends in response to climate stressors, and Lesser Prairie Chickens adapt their range in response to climate and weather changes.
  80. The Center for Environmental Science, Accuracy and Reliability (CESAR) was contracted to perform an independent peer review of the biological evidence using the Five Listing Factors in the Endangered Species Act. CESAR employs independent biologists that do not reside in the area, and whose interest is in “making sure that the Best Available Science is used to make listing petitions.”
  81. Dr. Zink stated that in issuing its listing report, he and CESAR peer-reviewed the studies and science used in the December 11, 2012 USFWS Lesser Prairie Chicken Listing Proposal as well as conducted ecological niche modeling for prediction of historical Lesser Prairie Chicken distributions.

### *Climate and Drought -*

82. Over the past 20,000 years, Lesser Prairie Chicken populations have survived and responded to 15 or 16 glacial events by adapting its range, and have survived ongoing changes in global climate. The glacial advance/retreat process naturally fragments habitat, displacing all species in its path. The biological and historical record of the Lesser Prairie Chicken indicates a remarkable ability to survive multiple glacial episodes, and resilience of the Lesser Prairie Chicken to respond and rebound from climate extremes is corroborated by WAFWA and the states, who recognize the Lesser Prairie Chicken has a high reproductive potential in years of adequate conditions.
83. Dr. Zink testified that as glaciers recede, plant communities and organisms again invade and re-colonize, and Lesser Prairie Chickens and other fauna follow the vegetation as range adaptations take place.
84. Dr. Zink testified Lesser Prairie Chickens have adapted from the south and west to their current distribution.
85. Dr. Zink testified drought has had a major effect on Lesser Prairie Chickens, a conclusion corroborated by the Coalition in its March 11, 2013 Public Comments. Since 2006, the entire ecoregion occupied by the Lesser Prairie Chicken has been undergoing severe drought comparable to the 1930's and 1950's, which exceeds a minus 4 (severe to extreme) on the Palmer Drought Severity Index. The Coalition has cited numerous literature references that Lesser Prairie Chicken populations historically decline and recover remarkably following drought events, a conclusion supported by WAFWA and the states.
86. The ongoing impact, intensity, magnitude, and difficulty presented by drought was mentioned independently during the testimony of Ranchers Emick, Hixson, Klemm, Commissioner Lewis, Senator Hineman and Senator Ostmeyer.
87. Mr. MacLeod testified the Listing Proposal is taking place during deep drought conditions comparable to the 1930's and 1950's and that USFWS has not adequately accounted for drought in its Listing Proposal.
88. In the December 11, 2012 Federal Register Notification, page 73868, USFWS recognizes drought is "*considered a universal ecological driver across the great plains,*" with prolonged drought capable of causing local extinctions of annual forbs and grasses. Despite acknowledgement that drought significantly affects entire ecological systems, the contribution of drought as a threat was not evaluated or brought forward by USFWS.

89. The official 2012 WAFWA Lesser Prairie Chicken population count was 34,440, as to where the 2013 count stood at 17,616; WAFWA and the states believe extreme population fluctuations are the norm for this species and KDWPT recognizes *“the new 2013 counts to be attributed with severe drought conditions (not habitat loss).”*
90. The record from previous droughts indicates populations of all gallinaceous birds, such as the Lesser Prairie Chicken, to rebound remarkably when drought-stricken regions receive adequate rainfall.
91. Newly formed habitat conservation programs, such as that contemplated by the WAFWA Rangewide Plan, will take years to result in substantive habitat improvements – as to where the KNRC *Lesser Prairie Chicken Conservation Management and Study Plan* provides for ongoing conservation activities.
92. Dr. Zink pointed out listing the Lesser Prairie Chicken as a threatened species under the Endangered Species act would have no effect on weather patterns or climate change events.
93. In 1967 the Attwaters Prairie Chicken was included as one of the first species to be protected under Federal Endangered Species protections. At the time of listing, populations of Attwaters Prairie Chickens were estimated at 1,000 birds; current populations of Attwaters Prairie Chicken languish at marginally over 100 birds. By contrast and during the same time period, Greater Prairie Chicken populations in voluntary conservation programs in Wisconsin and Minnesota have thrived, increasing from 1600 birds to 3000.

*Compensatory and Additive Mortality -*

94. Compensatory mortality is considered by biologists to be normal, natural and necessary to maintain and balance population levels; additive sources constitute human-induced contributions from individual threats that collectively add to and thus contribute to overall population declines, such that existence of a species may be threatened or endangered. Dr. Zink questioned the methodology in the USFWS listing approach where independent threats were *“simply added together”* apart from analysis of their individual, additive contribution, and he questioned that USFWS has adequately demonstrated that human contributions exceed compensatory levels.
95. In June of 2012, WAFWA and the 5 states urged USFWS to perform a comprehensive threat analysis for the Lesser Prairie Chicken indicating their awareness of the importance of such scientific analysis and its absence in the Lesser Prairie Chicken technical record.

96. USFWS has not performed a comprehensive threat analyses and has not scientifically demonstrated in its Listing Proposal that individual anthropogenic threats pose an extinction potential to the Lesser Prairie Chicken.

*Structures, Disease and Predation -*

97. The hypotheses of whether Lesser Prairie Chickens demonstrate adversity to tall structures, such as wind towers and power lines, was questioned as untested as preferences for nest location vary with predator density in any given year. Because raptors demonstrate adversity to wind towers, Lesser Prairie Chickens have been observed in studies nesting closer to those structures during periods of high raptor density. Nesting location choices vary with predator conditions and density, and no scientific data implicating specific structure type(s) is available.
98. In June, 2012, WAFWA and the states noted that there are no studies to indicate increased predation of adult nests or hatch-year birds originating from structures is “*outside the range of natural variation.*”
99. WAFWA and the states concluded,
- “Presently little is known on how wind power developments affect Lesser Prairie Chickens and/or Lesser Prairie Chicken habitats. To date the effects are speculative and not justification for listing, especially less than 2% of EOR is expected to be developed for this [wind energy] use.”*
100. Dr. Zink testified that CESAR reviewed the same studies USFWS used in its Listing Proposal. He stated that with respect to the threats posed by structures, the authors of those studies themselves concluded, “*we have no reason to believe the Prairie Chicken populations are being impacted severely by predation.*”
101. The increased threat of power lines and towers is purported by USFWS to result in increased predation because those structures afford better perches and increased vantage points for raptors. Dr. Zink reviewed other studies that conclude “*mammalian and reptilian predators have a greater influence on Lesser Prairie Chicken mortality during the breeding season.*” He went on to conclude because “*mammalian and reptilian predators don’t sit on top of telephone poles, the big threat then, to us, seemed to be an insignificant one.*”
102. No raptor predation studies or data exist distinguishing power poles, wind towers, pump jacks, and other structures selectively implicated by USFWS from raptor predation threats posed by grain elevators, trees and bridges – bringing into question the reasoning used by USFWS to selectively implicate specific energy infrastructure.

103. Dr. Zink reviewed studies used by USFWS in support of its Listing Proposal. He testified the science to support the Listing Proposal was skewed to achieve a particular outcome: [The listing] *“has a bunch of internal inconsistencies. What the paper [various studies] said, some of the things [for the Listing Proposal] were just cherry-picked. I mean, the whole story wasn’t brought forward.”*
104. The Coalition previously concluded, in its Conservation Plan, that anthropogenic (man-made) structures can present “logistical impediments” but Lesser Prairie Chickens routinely cross anthropogenic boundaries.
105. The literature demonstrates Lesser Prairie Chickens navigate across all anthropogenic sources in search of forage, winter riparian areas, and preferred mixed grass habitats.
106. The documented establishment of 68 new, previously undetected leks north of the Arkansas River since 1960 represents a major northward range expansion of the Lesser Prairie Chicken across road, power lines, bridges, an interstate-highway corridor and other anthropogenic features.

#### *Genetic Variability -*

107. In its listing document, USFWS tied habitat fragmentation with genetic variability to demonstrate habitat fragmentation contributes to reduced genetic variation and decline of the species’ resilience to outside stressors.
108. Genetic variability determines if populations are resistant to changes in climate, predation, competition and other stressors and thus may be extraordinarily susceptible to risk of extinction. Dr. Zink testified that a very significant genetic variability study (Hagen, 2010), employing a large number of biologists was not referenced in the Listing Proposal. Using data obtained from the Hagen study, Dr Zink and CESAR performed genetic variability analysis.
109. Dr. Zink and CESAR compared the genetic variability in existing Lesser Prairie Chicken populations throughout Kansas, Colorado, and Oklahoma. His work concluded Lesser Prairie Chicken populations contained just as much genetic variability in Colorado and Oklahoma as in Kansas, with Kansas populations being substantially larger than those in Colorado and Oklahoma. Dr. Zink concluded his studies show none of the Lesser Prairie Chicken populations are doing poorly, and he questioned why USFWS used some Hagen studies but neglected others in its Listing Proposal.



110. WAFWA and the states referred to the 2010 Hagen Study in preparation of the June 2012 letter. WAFWA's positive inclusion and statement "*according to current information, genetic exchange is still occurring at a significant level to maintain high genetic diversity for the species throughout a significant portion of its range, despite fragmentation levels,*" is indicative of their conclusion genetic variability is not reason to conclude reduced populations of the Lesser Prairie Chicken are susceptible to stressors of climate, disease and predation.
111. Dr. Zink concluded that reduced genetic variation is not occurring so existing fragmentation trends are not exposing Lesser Prairie Chicken populations to increased risk of extinction.
112. The wildlife agencies of the states as represented by WAFWA do not conclude the science supports that genetic variability is a problem resulting from habitat fragmentation.

*Population Counting: Methodology and Trends -*

113. In its September, 2012 Lesser Prairie Chicken survey, WAFWA observed Lesser Prairie Chicken monitoring and population counting methods differ markedly, yielding data inconsistencies in population trends over time, lek size, range and ultimately population status. Variations in survey methodology and scientific assumptions, combined with the historical lack of coordination between academia, state agencies, and others, has greatly complicated Lesser Prairie Chicken population measurement and behavioral assessment efforts.
114. In June, 2012 WAFWA and the states recognized "*limitations of current methods used for population estimates. These shortfalls include survey bias, small sample sizes, and access issues.*"
115. In its 2013 Lesser Prairie Chicken count Kansas Department of Wildlife, Parks and Tourism noted their data set to be incomplete due to missed routes.
116. Lesser Prairie Chicken seasonal migration habits result in differential annual counts as the species relocates around local landscapes in search of favorable habitat, forage, and nesting conditions.
117. Nicole Dick, BA Mathematics, MS Statistics, Professor of Statistics and Mathematics at Garden City Community College, testified the Lesser Prairie Chicken population data in the WAFWA Rangewide Plan understates the populations of the Lesser Prairie Chicken because the surveys "*only counted some of the chickens*" and the methodology of [WAFWA] "*surveyed leks and how they only counted some of the chickens.*"

118. Because Lesser Prairie Chicken counting methodologies only identify male “booming” during the mating season, females remain unaccounted for; the counting methodology simply doubles the number of audio-identified males, therefore assuming a 1 to 1 ratio of males to females.
119. Variations in individual sampling units determine the accuracy of measure and reliability of counting estimates because counting relies on audio detection of Lesser Prairie Chicken lekking activities. Further accuracy limitations to population counts include local topography, wind speed, season, institutional variations in methodology, and protocol.
120. The detectability of Lesser Prairie Chicken lekking activities was determined to be 5248 feet (less than 1 mile) in a published study co-authored by Heather Whitlaw, Field Office Supervisor of the Kansas USFWS Office. In her study, Whitlaw concludes at 5248 feet with optimum conditions audio detectability of lekking activities is “*equivalent to or below that of a whisper.*” Her audibility study verifies Lesser Prairie Chicken detectability to be further complicated by topography, wind, weather and Lesser Prairie Chicken habitat conditions.
121. Lesser Prairie Chicken counting protocols correspond to roadway locations, which in Western Kansas are often found at much greater distances than one-mile intervals.
122. The Whitlaw Study asserts audibility limitations of Lesser Prairie Chicken booming activities at greater than 1 mile will result in missed leks, reduced population counts and skewed data sets throughout the entire Lesser Prairie Chicken species candidate period.
123. Professor Dick concluded methodology used in the WAFWA Rangewide Plan population counts underestimate the number of Lesser Prairie Chickens.
124. In its two day 2013 Lesser Prairie Chicken lek counting survey, Kansas Department of Wildlife, Parks and Tourism counted only males, assumed males attend all counted leks and that leks were detected at 1 mile intervals, in a “*degree of bias[that is] is fairly consistent across years.*” In its two-day 2013 count, KDWPPT notes spring 2013 data collection was incomplete “*due to un-surveyed rates from previous years, and as a result data collection [for 2013 survey] was incomplete.*”
125. Norman MacLeod testified the Lesser Prairie Chicken surveys were performed for a maximum of 1% of the habitat concluding, “*This is a very small sampling area and likely represents a larger than acceptable potential margin of error in population counts.*”

126. In their June 7, 2013 comments USDA/FSA/NRCS/FS note for any final rule that *“in order to forecast as the FWS is required to for a final rule, a metric that is tied to the density or abundance of birds is needed before any determination is made.”*

*Habitat Fragmentation -*

127. USFWS stands alone among government agencies in its assessment of habitat fragmentation, population trends, grazing pressures, and collision mortality. USDA, Forest Service, NRCS, WAFWA and the states are all on record as disagreeing with USFWS’s untested definition of fragmentation, population trends, and hybridization of the Lesser Prairie Chicken.
128. In its December 11, 2012 listing document, USFWS cites *“historic, ongoing and probable future fragmentation”* of Lesser Prairie Chicken habitat as the primary factor for range contraction, and it suggests the compound effect of stressors and threats to be synergistic as the range of the Lesser Prairie Chicken further contracts—resulting in additional population declines of the Lesser Prairie Chicken.
129. In September, 2010 the Threatened and Endangered Task Committee appointed by the Secretary of Kansas Department of Wildlife, Parks and Tourism determined Lesser Prairie Chicken populations experience large variations in population density despite minimal loss in habitat.
130. On September 1, 2010 the Secretary of Kansas Department of Wildlife, Parks and Tourism accepted recommendations from the Threatened and Endangered Task Committee that denied a Petition by the Kansas Ornithological Society to list the Lesser Prairie Chicken as a Kansas State threatened species.
131. In June, 2012 WAFWA and the states observed that fragmentation has contributed to historical population declines and that recent conservation programs have slowed habitat fragmentation.
132. WAFWA and the states are on record as disagreeing with the science presented in 2008 and 2010 USFWS listing-priority and Candidate Notice of Reviews (CNOR) determination process:
- CNOR are based upon risk assumptions and projections, as to where states have hard science on fragmentation trends;
  - Since the Lesser Prairie Chicken has become a candidate species, populations of the bird have undergone a 3-fold range expansion in Kansas, and 25% increase in estimated occupied range (EOR);
  - Lesser Prairie Chicken populations have stabilized or are increasing depending upon habitat type;

- As of June, 2012 the feared return of Conservation Reserve Program (CRP) land to agricultural pursuits has not occurred; according to NRCS/FSA the CRP program over the short term has witnessed an 11% decrease between 2008 and 2011, but long term trends since 1998 demonstrate an overall 3% net gain in CRP enrollment;
- The assumption that expiration of individual CRP contracts translates into land being taken out of Lesser Prairie Chicken habitat is not accurate;
- Attrition of CRP enrollments is partially a result of NRCS and FSA programs becoming more discriminatory and excluding marginal lands once accepted in the program;
- The NRCS/CRP SAFE program, specifically aimed at Lesser Prairie Chicken conservation, retains 126,824 acres (of the available 147,600 acres) under long-term contracts;
- Successes of 5-State Watershed Action Team (SWAT) programs are reported by NRCS to provide measurable conservation practices, translating directly into reductions in habitat fragmentation;
- A significant portion of Lesser Prairie Chicken habitat remains in Lesser Prairie Chicken conservation plans and programs controlled by Federal and State agencies through Candidate Conservation Agreement with Assurances (CCAA) related programs:
  - 279,998 Texas Acres in Lesser Prairie Chicken farming and ranching CCAAs and 971,533 acres in wildlife management and programs;
  - 1,523,573 New Mexico and 97,335 Oklahoma acres in grazing programs;
  - 1,024,691 5-state acres in grazing cost-share programs; and,
  - 187,864 New Mexico acres, 11,000 Colorado acres and 20,989 Oklahoma acres in habitat protection programs.

133. In its June 7, 2013 comments the federal agencies responsible for the CRP program, USDA/NRCS/FSA/FS, note CRP acreage remains stable at 86% and the threat of expiring CRP contracts and potential extirpation of the Lesser Prairie Chicken due to decreased habitat “requires further examination:”

*“An examination of current data of CRP acreages and LEPC populations indicates that CRP acreage has remained relatively stable over the past 20 years and LEPC populations in this region are projected to increase with virtually no likelihood of extirpation in the next 30-100 years (Garton 2012). An analysis that compared the location of expired CRP fields to the 2010 NAIP imagery in Kansas indicated that 86 percent of the acreage was still in grass. Not only were these acres still in grass cover but were located in areas of significant conservation need for LEPC, suggesting that the threat of grassland loss through expiration of CRP contracts requires further examination.”*

134. Relocation and establishment of 68 new Lesser Prairie Chicken leks north of the Arkansas River between 1998 and 2011 indicates adaptability of the species to conditions and resilience to habitat fragmentation.
135. Dr. Zink testified Lesser Prairie Chickens migrate to varying habitat regions throughout the year for lekking, breeding, roosting and feeding, which means transition across habitat “edges” is routine and normal behavior; he characterized routine transitions of Lesser Prairie Chickens as “*normal behavior*” and not of concern with respect to biological traps, sinks, or impediment to survival from edge concerns purported in the listing document.
136. In its Lesser Prairie Chicken Conservation Plan, the Coalition recommended land multi-use studies to determine the minimum baseline Lesser Prairie Chicken population level parcel and habitat sizes necessary to support 6 to 10 leks and minimum nesting, breeding, roosting and feeding activities.

#### *Grazing -*

137. The USFWS and NRCS Conference Report > Conference Opinion > Biological Opinion process has codified Conservation Practices mandatory to NRCS contracts under the Upland Wildlife Habitat Management and other NRCS programs. Under Standard Conservation Practice 528, “Prescribed Grazing,” routine agricultural livestock grazing would be highly regulated and subject to Conservation Practice 645, “Upland Wildlife Habitat.”
138. Conservation Practice 645 of the Biological Opinion imposes grazing restrictions and is purported to “improve and maintain desired plant species composition, quality, vigor and a vegetative structure mosaic,” as well as “*increase forage quality for grazing and browsing animals’ health and productivity.*”
139. Conservation Practice 645 allows the ability of federal agencies “*to modify existing infrastructure [on private property] to reduce or eliminate potential adverse effects resulting from those structures,*” and requires preparation of an Environmental Evaluation for each property receiving funding.
140. Conservation Practice 645 allows establishment of permanent photo locations on private property. Conservation Practice 645 allows access to private property “*on a regular basis*” for “*evaluation of habitat conditions.*”
141. In its December 11, 2012 Federal Register Notification, USFWS recognized the lack of science, studies, and information on grazing throughout the 5 State region:  
  
*“Although documented, the significance of direct livestock effects on the Lesser Prairie Chicken is largely unknown, detailed rangewide information is lacking on the extent, intensity, and forms of recent grazing, and the associated effects on the Lesser Prairie Chicken.”*

142. Immediately thereafter USFWS speculates:

*“However, livestock grazing occurs over such a large portion of the area currently occupied by lesser prairie-chickens that any degradation of habitat it causes is likely to produce population-level impacts on the lesser prairie-chicken.”*

143. In its June 7, 2013 comments the agencies responsible for farm programs, e.g. USDA/FWA/NRCS/FS specifically refer to the threat posed by livestock grazing as a “*notion*,” and they collectively are on record as vehemently defending livestock grazing as an effective tool for range management:

*“There is significant scientific disagreement regarding the assumption that livestock grazing occurring over a large portion of the LEPC occupied area degrades habitat and causes population-level impacts on the LEPC. NRCS data refute this notion. Well-managed grazing lands can be high quality LEPC habitat. Further, NRCS has worked with ranchers to implement over 1 million acres of prescribed grazing management in the LEPC range, contributing to improved rangeland health. Using National Resource Inventory data, NRCS initial analyses show that rangeland health and vegetation conditions for LEPC are not as impacted or overgrazed as the proposed rule supposes.”*

144. Clint Pearson, banker, 5<sup>th</sup> generation rancher and manager of ranches in 5 Kansas counties, testified that the NRCS CRP Program can be an impediment to the Lesser Prairie Chicken habitat. Because grazing is either not allowed or heavily restricted on CRP lands, the result is a homogeneous plant community that impedes Lesser Prairie Chicken mobility.

145. Mr. Pearson testified grazing is a powerful tool in land management and historic “mob grazing” patterns that tear up and aerate land making it more productive for livestock and the Lesser Prairie Chicken.

146. Ken Klemm, Sherman County Commissioner, buffalo ranch owner, and holistic conservationist, testified grazing is a natural part of the system, and mob grazing of millions of buffalo was beneficial to Lesser Prairie Chickens as the two “*evolved together, cohabitated together and could exist in perfect harmony together.*”

147. Commissioner Klemm read into the record a firsthand account from 1860 by author and lay ornithologist J.R. Mead. Mead recounts firsthand knowledge of buffalo grazing habits where wave after wave of buffalo herds would pulverize the landscape to “innumerable parallel paths.” The buffalo would eat all the vegetation “close to the ground.” Mr. Mead goes on to write how the whole country, following grazing patterns, would reestablish itself to an appearance of a “*well-kept park belonging to an English nobleman.*”

148. Rancher Keith Edwards corroborated Commissioner Klemm's testimony that buffalo trampling contributes to grass recovery. He gave testimony that rather than being a threat, grazing is a tool for effective ecosystem management.
149. Mr. Edwards, in testimony corroborated by Commissioner Klemm, discussed holistic management principles by international grazing conservationist Allan Savory. The carefully planned holistic principals discussed by Mr. Edwards and employed by Commissioner Klemm demonstrate in practice improved vegetative diversity, quality and abundance that results in improved Lesser Prairie Chicken habitat.
150. Mr. Edwards testified that at holistic management seminars he has attended, experts presented aerial photographs of lands demonstrating abundant vegetation on mob grazed lands and "sparse" vegetation on adjacent, government-managed lands.
151. Mr. Edwards concluded his testimony that mob grazing increases grass diversity and that restricting grazing will decrease the chance for survival of the Lesser Prairie Chicken.
152. Nikki Schwerdfeger, Hamilton County Commissioner and 3<sup>rd</sup> generation farm and ranch owner, testified as a girl her grandparents told about the Lesser Prairie Chicken lekking season to observe and enjoy the species; over time she witnessed introduction of center pivot sprinklers, fencing, and increased agricultural activities across their hundred-year-old farmstead.
153. Commissioner Schwerdfeger testified introduction of modern agricultural practices have sustained forage and alfalfa for the Lesser Prairie Chicken.
154. Commissioner Schwerdfeger's testimony is corroborated by detailed comments KNRC filed with USFWS on March 11, 2013.
155. Commissioner Schwerdfeger said that her 15 quarters of ranch land continues to support Lesser Prairie Chicken lekking, nesting, and foraging activities, and declines in Lesser Prairie Chicken, songbird, quail, and other fowl populations are due to drought conditions witnessed throughout the region. She stated the Lesser Prairie Chickens have "*adapted to farm life.*"
156. Commissioner Schwerdfeger testified her land is a prime candidate to collect mitigation monies from the WAFWA Rangewide Plan, and that she could "*be a bad neighbor and say, okay there is money in it for me. Let me have it. But the Lesser Prairie Chickens will survive without paying me to do the things I am already doing.*"



## WAFWA RANGEWIDE PLAN

157. In June, 2012 WAFWA and the states concluded local conservation practices are sufficient and that scientific and commercial information indicates the Lesser Prairie Chicken is not now or in the foreseeable future threatened, rendering the need for federal intervention unnecessary:

*“We conclude, with existing habitat conservation practices being implemented to reduce habitat fragmentation, and the best scientific and commercial information available, the LPC is not now, or in the foreseeable future, threatened by predation or disease to the extent that listing under the ESA as a threatened or endangered species is warranted at this time.”*

158. In its September 1, 2010 memorandum the Secretary of Kansas Department of Wildlife and Parks (KDWP) accepted recommendations from its Threatened and Endangered Task Committee that KDWP should not list the Lesser Prairie Chicken as a State Threatened Species.

159. The reasoning used by the Kansas Department of Wildlife and Parks Threatened and Endangered Task Committee in concluding listing of the Lesser Prairie Chicken was unnecessary included:

- *“Documentation of over 200 lek sites north of the Arkansas River since 1990 in an area where the Lesser Prairie Chicken population was sparse or nonexistent;”*
- *“The Threat of habitat loss due to expiring CRP contracts has lessened due to federal agricultural policies that target renewal of CRP contracts to focus on Lesser Prairie Chicken habitat. One of the Conservation Priority Areas in Kansas is specifically designated for the Lesser Prairie Chicken;”*
- *“The threat of habitat fragmentation from energy development remains an uncertainty, but recent efforts to protect Lesser Prairie Chicken habitat are recognized;”*
- *“There is currently not enough known about the effects of energy development on Lesser Prairie Chicken habitat to assume developed areas will preclude Lesser Prairie Chicken use;”*
- *“Several ongoing and pending conservation actions directly or indirectly target habitat used by the Lesser Prairie Chicken;” and,*
- *“The majority of the ad hoc committee of Prairie Grouse Experts recommended that the Lesser Prairie Chicken remain unlisted in Kansas.”*

160. The first sentence of the introduction section of the WAFWA Rangewide Plan states [the plan] *“is intended to preclude the need to list the Lesser Prairie Chicken under the Endangered Species Act of 1973, as amended (ESA).”*

161. In testimony given before the Hearing Council, Keith Sexson stated the intent of the WAFWA Rangewide Plan is to “*preclude a listing.*”
162. The purpose that the WAFWA Rangewide Plan is designed primarily to “preclude a listing” is corroborated in testimony by Jim Pittman at the Public Hearing, in coordination meetings, on slide presentations and in correspondence.
163. At the Public Hearing, when asked if USFWS has adequate scientific and commercial information upon which to base their proposed listing of the Lesser Prairie Chicken, Mr. Sexson stated Kansas Department of Wildlife, Parks and Tourism had “*not taken a position on the information that they [USFWS] have available to essentially go forward with a proposed listing.*”
164. Keith Sexson was the primary recipient of the September 1, 2010 Memorandum where then Secretary Hayden accepted the position of the Threatened and Endangered Task Committee that the Lesser Prairie Chicken not be listed as a state threatened species.
165. Keith Sexson was the author of the June 2, 2012 letter to Dr. Benjamin Tuggle on behalf of WAFWA and the states that concluded the best science and commercial information do not support a federal determination that the Lesser Prairie Chicken is threatened or a listing necessary for its continued existence.
166. Norman MacLeod, endangered species and public policy expert and former executive director of Environmental Sciences Independent Peer Review Institute, testified that as of November 5, 2013 Kansas Department of Wildlife, Parks and Tourism had sold 3,723 Lesser Prairie Chicken Hunting Permits at \$2.50 each.
167. Mr. MacLeod concluded due to the number of available hunting permits and the ongoing hunting season, Kansas Department of Wildlife, Parks and Tourism does not believe the Lesser Prairie Chicken “*is in sufficiently dire straits to warrant listing under the ESA.*”
168. Jim Pitman testified that there had been numerous conferences “*at the technical and at the administrative levels*” between WAFWA, USFWS and a select portion of the oil and gas industry during preparation of the mitigation portion of the WAFWA Rangewide Plan.
169. Jim Pitman testified the primary target of WAFWA mitigation is “*big industries;*” and that participation by oil and gas organizations is specifically what the service “*has indicated they’re going to review when they evaluate the effectiveness of our plan.*”
170. Mr. Pitman testified that USFWS, individual companies from the oil and gas industry, and WAFWA were involved in the “*permitting-process*” discussions and of the WAFWA Rangewide Plan because CCAAs have been tested in court.

171. A select group of oil and gas companies participated with WAFWA in defining the mitigation cost structure for the WAFWA Rangewide Plan.
172. Mr. Pittman testified local government was not involved in scoping or development of the WAFWA Rangewide Plan and no attempt was made to contact individual counties; participation of the counties was only sought in public meetings and comment periods following completion of the draft WAFWA Rangewide Plan and subsequent revisions.
173. The WAFWA Rangewide Plan proposes a 17-seat Advisory Committee that reports to a WAFWA Initiative Council comprised of non-elected members from the 5-state Fish and Wildlife Agencies. The 17-seat Advisory Committee would be comprised of industry, Non-Governmental Organizations (NGO), and other interested parties, along with 3 seats allocated among the 197 counties throughout the area regulated by the WAFWA Rangewide Plan.
174. The WAFWA Rangewide Plan proposes to put 197 local government counties on the same advisory platform as NGOs, all competing for three advisory seats.
175. Verbal testimony by senior management representatives of Wheatland Electric Cooperative, Sunflower Electric, Kansas Electrical Power Corporation, CMS Electric Cooperative and the statewide organization Kansas Electric Cooperatives (KEC) revealed that none of those companies or associations were contacted by WAFWA representatives for review, comment or opinion during preparation of the mitigation cost portion of the WAFWA Rangewide Plan.
176. Kansas Electric Cooperatives' CEO Bruce Graham testified the "*only certainty, after reviewing the [WAFWA Rangewide] Plan, is that mitigation will be onerous and costly.*" He went on to testify the WAFWA Rangewide Plan will conflict with other Kansas state economical programs, such as the Rural Opportunities Zone Initiative, and that implementation of the mitigation portion would impact affordable housing, development and raise the cost of new rural infrastructure.
177. Mr. MacLeod testified that in his review of the WAFWA Rangewide Plan, "*WAFWA envisions collection of a quarter of a billion dollars in enrollment and mitigation fees over the course of 10 years,*" and "*the KNRC alternative would achieve similar goals at far lower expense.*"
178. At two points during his testimony, Mr. Sexson states the WAFWA Rangewide Plan would "*prohibit disruption*" of economic activity "*in an area vital to state and national interest.*"

179. Mr. Sexson testified he was not familiar with the safeguards to the human environment ensured by the NEPA process; the focus of the WAFWA Rangewide Plan was to provide a strategy to eliminate threats perceived by USFWS in order to preclude a listing. He also shared that there were no assurances that the WAFWA Rangewide Plan would be accepted by USFWS nor had Kansas Department of Wildlife, Parks and Tourism considered what would become of pre-enrollment mitigation monies from industry if USFWS listed the Lesser Prairie Chicken but rejected the WAFWA Rangewide Plan.
180. Kansas Department of Wildlife, Parks and Tourism has contributed to preparation of a federally endorsed plan without being familiar with the fundamental federal procedural and economic requirements that balance human and natural environments.
181. Mr. Graham testified calculations made by KEC would raise the cost of distribution lines by \$11,000 to \$22,000 per mile and transmission lines by \$870,000 per mile, and that the not-for-profit electric cooperatives that occupy the Lesser Prairie Chicken range have no alternative but to pass those increased cost to member consumers, with the statement, *“every mile of line that they have to construct is going to mean visible dollars on the electric bill.”*
182. Lynn Freese, Director of Member Services for Wheatland Electric Cooperative (WEC) that services 14 counties in the range of the Lesser Prairie Chicken, testified that of the 48-mile-average of distribution line WEC constructs per year, WEC would be facing *“an additional cost exposure of over \$550,000 per year.”* He testified WEC would be, by law, allowed to pass 90% of those costs on to customers, which would result in an estimated 1% escalation of all electrical rates per customer, per year.
183. Wheatland Electric Cooperative estimates 90% of the increased costs would be borne by new development, and over a 25 year period, the WAFWA Rangewide Mitigation proposal would add \$13,750,000 in costs in WEC’s service territory alone.
184. Wheatland Electric Cooperative concluded their analysis of WAFWA Rangewide Plan’s mitigation costs by stating:
- “Imposing these costs on member/consumers of Wheatland Electric will assuredly have a negative impact on new development, as well as the existing member/consumer base, especially those in the lower income brackets who tend to be elderly and minorities.”*

185. Kirk Thomson, General Manager of CMS Electrical Cooperative, testified the mitigation costs under WAFWA Rangeland Plan would have a direct impact on rural populations, and those costs would disproportionately fall on folks in the western part of Kansas.
186. Mr. Thompson stated construction costs for a mile of distribution line in Chat 2 Habitat would double, and his calculations indicate a new development could cost a homeowner an additional \$300 per month over a typical 60-month contract period.
187. Mr. Thompson stated that individual landowners wishing to develop their property would themselves be faced with pass-through costs contemplated by the mitigation portion of the WAFWA Rangeland Plan because territory serviced by cooperatives *“does not have developers to front or share costs.”*
188. Mr. Thompson questioned why the costs to conserve the Lesser Prairie Chicken - because of the impacts of increased electric rates - should fall only to those in Western Kansas, and not the entire state or even the nation.
189. Scoping and primary preparation of the WAFWA Rangeland Plan has taken place without the involvement of or input from the 32 member KNRC Coalition.
190. The cost portion of the WAFWA Rangeland Plan has been prepared in concert with and input from only a small portion of affected industries.
191. The organizational structure of the WAFWA Rangeland Plan provides a limited role and advisory-only capacity for local governments.
192. The WAFWA Rangeland Plan, prepared using federal monies and with federal oversight, does not consider the cost implications to the human environment, industry, local government, minorities, families and local disadvantaged populations.
193. The WAFWA Rangeland Plan neglects to consider the downstream and long term cultural impacts and social cohesiveness issues that could arise from costs associated with its mitigation proposal.

## LAND USE

### *Conservation Easements -*

194. Conservation Easements are land title encumbrances that impose specific and detailed requirements on landholders such as buffer zones; riparian setbacks; land use and access restrictions; livestock and management requirements; imposition of inspection rights; structure construction, design, location or removal restrictions. Conservation Easements form the heart of the WAFWA Rangewide Plan with 25% of revenues proposed to purchase “In Perpetuity” habitat easements for Lesser Prairie Chicken habitat.
195. Examples of Conservation Easement programs cited in the WAFWA Rangewide Plan include the 4,183-acre Nature Conservancy Wilhite Ranch and 1,293-acre Lowe Ranch State Habitat in Prowers County, Colorado.
196. Prowers County, Colorado is located in Lesser Prairie Chicken habitat immediately adjacent to Coalition members across the Kansas state border.
197. Two large Prowers County ranch and land owners, Ms. Jillane Hixson and Ms. Valerie Emick, gave testimony about firsthand experience with Conservation Easements.
198. Ms. Hixson is a 3<sup>rd</sup> generation rancher and landholder; The Hixson farm dates back to the 1890s at which time her forefathers homesteaded the property she now manages.
199. In 2003, the Hixson family entered into a newly-legislated Colorado Conservation Easement Program and subdivided 150 acres of prime property valued at \$12,000/acre (\$1.8 million) into 3 separate Conservation Easements.
200. The Colorado Conservation Easement Tax Statute is based upon Internal Revenue Service (IRS) standard 26 USC170(h).
201. When the Colorado Conservation Easement program was initiated, thousands of prospective landholders attempted to participate in the program, and the \$265 million claim to tax exemptions quickly overwhelmed the \$20 million planned by Colorado for the Conservation Easement program. This resulted in a decision within Colorado Department of Revenue (CDOR) to implicate state-certified conservation easement appraisers.

202. The Hixson Conservation Easements were appropriately inspected by Colorado state certified appraisers, all conservation forms were completed, and state-required studies done according to policies. Following execution of the Conservation Easements, tax incentives were granted by the State of Colorado and the tax exemptions were transferred to a number of Conservation Easement purchasers.
203. In 2007 conflicts arose between CDOR, IRS, and the Hixson family over the value of the Hixson Conservation Easements even though the easements were appraised, certified and all procedures for their recording were precisely followed.
204. In 2011, CDOR appraised the Hixson property at a value of \$0 per acre, and assigned penalties and back taxes of \$1,560,000. The CDOR determination was at odds with formal determinations made by the IRS, who held the Hixson Conservation Easements retained value according to their 170(h) standard.
205. In addition to their property having been devalued from \$1.8 million to \$0 and the cost of lawyers, accountants, appraisers, stress and time, Ms. Hixson testified their family is still facing 34 law suits from individuals who purchased the Conservation Easement tax credits under the State approved program.
206. Ms. Hixson testified about another Conservation Easement holder in Winter Park, Colorado who also participated in the Colorado Conservation Easement Program and holds property valued by CDOR at \$0 - while neighboring properties routinely sell for \$60 million.
207. In the event of bankruptcy, the Hixson land containing Conservation Easements will be auctioned for the value of the land minus the encumbrances; the land can then be purchased by the Conservation Easement holder or Land Trust Company, who are the only entities that can remove the Conservation Easement restrictions from the title. The land can then be resold for market value.
208. In 2008 the Colorado Legislature revised the Conservation Easement Statute and applied the law retroactively, negatively affecting all landholders who entered into Conservation Easements between 2003 and 2008.
209. Ms. Hixson went on to testify that the CDOR has rejected 800 appraisals from the period of 2003 - 2007.
210. The Conservation Easement restrictions remain on the Hixson property.



211. Valerie Emick, a 3<sup>rd</sup> generation rancher, owns a large ranching and wind farm operation also in Prowers County, Colorado. In 2005, Ms. Emick and her family donated 13 parcels of high quality land to the Conservation Easement program, one containing a gravel pit operation. Ms. Emick testified due to problems with the Conservation Easement program, that the State of Colorado (CDOR) has valued their land at \$0 per acre.
212. The Emicks donated 5 easements for \$794,000 in tax credits and to-date have spent \$340,000 in legal fees stemming from law suits associated with purchasers of their Conservation Easements tax credits. Ms. Emick described how the Colorado system does not allow for buyers and sellers of Conservation Easement tax credits to share information, complicating fact-finding.
213. Ms. Emick believes Conservation Easement land devaluations could happen in Kansas and Conservation Easements are a way for states to make up budget shortfalls and the government to gain control of private lands - testimony that was corroborated by Ms. Hixson.
214. In the October, 2013 version of the WAFWA Rangewide Plan, page 78, WAFWA proposes a 3,929,600 acre set aside for Focal Areas and a 500,480 acre set aside for Connectivity Zones in Kansas. USFWS has accepted a minimum goal of 25% lands to be set aside by in perpetuity Conservation Easements (but desire 50% or more.)
215. Based upon the Hixson and Emick property devaluation experience and current average NRCS land-value of \$1,900 per acre, the USFWS goal for the 1,107,520 acres of habitat set aside of Focal and Connectivity lands could result in a devaluation of \$2,104,288,000 - before additional consideration that Conservation Easements result in mineral-right devaluations, split-estate issues and access concerns.

#### *Split Estates -*

216. Mr. Freese testified Wheatland Electric owns several thousand acres of restored Lesser Prairie Chicken habitat in Kearny and Finney Counties – land that is an *“ideal candidate to be enrolled in the WAFWA Mitigation Program.”*
217. Mr. Freese indicated under the current WAFWA Conservation Plan, subsurface mineral right holders across the many thousands of acres of Lesser Prairie Chicken range could experience difficulty accessing their water and mineral rights if the land is set aside in the WAFWA Conservation Mitigation program.

218. Mr. Freese articulated a scenario that as Lesser Prairie Chicken populations on lands in mitigation programs increase and birds migrate to adjacent properties, conflicts between adjacent landholders will arise because some lands will not be in conservation programs.
219. Mr. Freese testified there is “*gas production under every square foot*” and oil production “*under certain portions*” of Wheatland property and if Wheatland were to allow Conservation Easements on the surface then access for drilling pads and new wells could be prohibited. Because subsurface rights for the Wheatland properties are held by others, he recounted a situation where lawsuits will result because subsurface rights holders will be denied access by conservation easement provisions on the same tract of land.
220. Counties derive tax revenue from oil and gas production.
221. Mr. Pitman speculated that if conflicts arose between a mineral rights holder and a landholder enrolled in conservation, the conflict would be sent to the advisory board of WAFWA. This approach would remand split estate disputes to an unelected board partially comprised of foreign nationals to redress American land disputes.
222. Mr. Sexson testified the states would retain management authority over “resident fish and wildlife” lending uncertainty to the role of the state and WAFWA in redressing split-estate conflicts.
223. Commissioner Klemm read into the record the Third Amendment of the Kansas Bill of Rights, and pointed out there is no mechanism to exercise the right for redress of grievances under the Kansas Constitution or the First Amendment of the U.S. Constitution in the WAFWA Conservation Plan.
224. Commissioner Klemm drew attention to the fact that Kansas Department of Wildlife, Parks and Tourism has no authority under the Executive Branch of government to “*assess fees to private property, both land and improvements;*” and he has not heard of the legislature granting such authority.
225. Because WAFWA has no authority and thus would only be the administrator of the WAFWA Conservation Program, and because Kansas Department of Wildlife, Parks and Tourism has no jurisdiction over the split estate issue, any issues arising from split estate problems would be left to land owners and mineral-rights holders.

## COMPLIANCE WITH FEDERAL STATUTES AND EXECUTIVE ORDERS

226. The Statutes, EOs and CEQ Regulations cited in the *Kansas Natural Resource Coordination Plan* assure local government receives accurate information, appropriate review of alternatives, reasonable assessment of economic consequences, prior notification of federal proposals, reasonable opportunity to vet issues and ample time to understand the implication of federal proposals on the human and natural environments.
227. Federal Statutes, EOs and CEQ Regulations cited in the *Kansas Natural Resource Coordination Plan* assures federal agencies preparing proposals will carefully consider the potential economic consequences, risk to private property from incidental property takes, impacts to agriculture and have published a reasonable understanding of the implications for the proposed Major Federal Action.
228. Mr. Carlson testified that KNRC personally reviewed with USFWS the *Natural Resource Coordination Plan* and the FLPMA ESA requirement to take into account local plans.
229. KNRC has been precise in its correspondence and consistent in its expectation that USFWS adhere to the CEQ, NEPA, Regulatory Flexibility Act and EO mandates that balance human and natural environments.
230. At the November 1, 2013 Coordination Meeting Number 2, USFWS stated objections to KNRC's interpretation of Statutes, EOs and CEQ Regulations and has since refused to address, respond to or communicate with KNRC details of its objections to KNRC.
231. Department of Interior Solicitor Dana Jacobsen refused repeated overtures to attend the KNRC Public Hearing or further comment on USFWS's stated disagreement of the authorities in the KNRC Plan.
232. There is no indication in the Public Record USFWS has performed the required Quantitative Regulatory Flexibility Analysis regarding the economic impact to small entities and businesses in the region covered by the Lesser Prairie Chicken Listing Proposal.
233. There is no indication USFWS has accounted for unintended consequences, performed a comprehensive cost/benefit analysis using local data, statistics and history, evaluated the aggregate cost/benefit to the human and natural environments, or attempted to select the least net-cost alternative.
234. The Listing Proposal is silent on the evaluation of impacts to private property and other potential, unnecessary takings required by EO 12630.

235. USFWS personnel have stated, at Coordination Meeting Number 2, its intent to not perform an Environmental Assessment (EA) or Environmental Impact Statement (EIS) as required by the National Environmental Policy Act and Council on Environmental Quality.
236. KNRC has brought USFWS's attention to the obligation to perform an Environmental Assessment and the application of recent decisions from the 10<sup>th</sup> Circuit Court of Appeals.
237. USFWS continues to ignore the Coalition's position that applicability of the 1995 ruling by the 10<sup>th</sup> Circuit Court of Appeals that Catron County Board of Commissioners v. USFWS supersedes its own interpretation the EIS is not required "*as a matter of law.*"
238. USFWS is unresponsive to the Coalition's position that it must account for private property land interests and public health and safety as required by EO 13352. By continuing to ignore the *Lesser Prairie Chicken Conservation, Management and Study Plan*, USFWS is disregarding EOs 12372 and 13575 requiring federal agencies to utilize local plans and processes and accommodate concerns by local elected officials.
239. The FLMPA requirement for federal agencies to attempt consistency with local plans "*to the maximum extent possible*" necessitates USFWS attempt to reconcile differences with the KNRC *Natural Resource Conservation, Management and Study Plan* and reconcile its endorsement of the WAFWA Rangewide Plan to the local KNRC Plan.
240. In not performing the minimum required economic and social impact studies, USFWS has not considered the impact of the Listing Proposal on minorities, low-income populations and families as required by EOs 12898 and 12250.

#### *Critical Habitat -*

241. In the December 11, 2012 Listing Proposal, USFWS stated it has determined "*designation of critical habitat to be prudent but not determinable at this time.*" Webster's Dictionary of 1828 defines "*prudent*" as "*cautious; circumspect; wise; careful of enterprises, measures or actions.*"
242. The WAFWA Rangewide Plan endorsed by USFWS proposes four geographical ecoregions comprising the Lesser Prairie Chicken range, and within those zones are "Focal Areas" and "Connectivity Zones" deemed essential to conservation of the Lesser Prairie Chicken - requiring special management and protection.

243. By endorsing the WAFWA Rangewide Plan, USFWS has geographically identified ecoregions, focal areas and connectivity zones that are critical habitat by definition in Endangered Species Act Section 3(5)(a).
244. Mr. Pitman gave testimony that WAFWA used the term “Crucial Habitat” instead of “Critical Habitat” so as intentionally not to be clear in the geographic designation of the Lesser Prairie Chicken habitat.
245. Mr. Pitman indicated if USFWS were designating areas of critical habitat, *“they would probably want to identify areas just where the birds are located, and currently high quality habitat”* and that the WAFWA Ecoregions, Connectivity Zones and Focal Areas *“may be good for that purpose.”*
246. Executive Director Carlson testified that there is no distinction between the words “crucial” and “critical” when it comes to the intent and implementation of the WAFWA Rangewide Plan.
247. Hearing Officer Fred Kelley Grant pointed out that when USFWS pointed to the ecoregions and strongholds in the Federal Register Notification, they are identifying Critical Habitat; he went on to say,
- “USFWS is attempting to divide the statute that says when they list [a species] they shall designate critical habitat: they’ve tried to divide it so that all they do is list it, and they [USFWS] say we’re not designating critical habitat so we don’t have to go through NEPA, but in fact, they are.”*
248. USFWS has proposed four Ecoregions with Connectivity Zones in its Listing Proposal that contain specific, geographic focal areas occupied by the Lesser Prairie Chicken that contain habitat essential to conservation and which require special management protections.
249. By endorsing the WAFWA Rangewide Plan, USFWS has designated Critical Habitat for the Lesser Prairie Chicken.

## CONCLUSIONS

### *Coordination*

- The Secretary of Interior has demonstrated full understanding of the statutory and administrative coordination requirement through its action with local government in the Logan County, Kansas, Black-footed Ferret introductions and in multiple locations nationwide.
- Throughout the preparation, publishing and the promotion of its Lesser Prairie Chicken Listing Proposal and special 4(d) Rule, the Secretary has willfully neglected coordination with 39 Western Kansas local governments.
- By ignoring repeated requests to attend the Kansas Natural Resource Coalition (KNRC) Public Hearing or provide any response of its stated disagreement with KNRC's use of authorities in the *Natural Resource Coordination Plan* and its *Lesser Prairie Chicken Conservation, Management and Study Plan*, the Secretary has deliberately refused to coordinate with local government.
- By dispatching field-level staff to attend crucial and time sensitive coordination meetings - despite specific requests for personnel commensurate to the issues - USFWS has disregarded the importance, timeliness and significance of local coordination efforts germane to the Lesser Prairie Chicken Determination Process.
- Through willful and ongoing disregard for the *Lesser Prairie Chicken Conservation, Management and Study Plan* adopted by 32 member Kansas Counties that predominate Lesser Prairie Chicken habitat, the Secretary is missing an integral conservation component fundamental to an accurate determination under Section 4 of the Endangered Species Act.
- By continuing to ignore KNRC's plea to attempt consistency between the USFWS-endorsed Western Association of Fish and Wildlife Agencies (WAFWA) Rangewide Plan and the KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan* the Secretary has neglected statutory responsibility and fallen short of the standard required of federal agencies to keep apprised of, assist with and reconcile inconsistencies between local plans.
- Throughout the experimental Black-footed Ferret introduction project USFWS has knowingly violated local ordinances, provided incomplete information and perceptively misled Logan County commissioners during on-the-record coordination meetings.

- Because the Secretary has not taken into account the 32-County KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan* whatsoever, the Secretary is not in a position to make a sound, fully-informed, scientific determination of the present and future risks to the Lesser Prairie Chicken under ESA Section 4(b).

### *Science, Data and Technical Considerations*

- The Secretary demonstrated that the USFWS lacked sufficient scientific information upon which to base a defensible ESA listing decision for the Lesser Prairie Chicken by extending the decision deadline to remedy the Service's lack of information. Despite the availability of a significant body of additional scientific and commercial information, USFWS has failed to provide meaningful consideration to a significant portion of that information. USFWS failed to fully comply with its mandate to use the best available scientific and commercial information for the purpose of making a fully informed listing decision.
- The threat posed by habitat fragmentation in the listing proposal is scientifically untested, inconclusive, based upon outdated Conservation Reserve Program (CRP) information and lacking range-wide population trend data.
- The public record does not contain evidence or studies that USFWS has performed required population density and abundance metric analysis on a range or ecoregion level.
- The public record does not contain evidence USFWS has performed an analysis characterizing and distinguishing the individual, additive and compensatory contributions of all threats in its listing proposal.
- USFWS concerns of habitat withdrawal from CRP and State Acres for wildlife Enhancement (SAFE) programs due to expiring contracts are verifiably inaccurate, anecdotal and without scientific justification.
- Baseline data sufficient to adequately ascertain habitat fragmentation as a significant threat to the continued existence and future of the Lesser Prairie Chicken on a rangewide basis does not exist.
- Genetic variability analysis not sufficiently considered by USFWS in its Listing Proposal indicate that more than adequate genetic exchange continues throughout Lesser Prairie Chicken populations in Kansas, Colorado and Oklahoma; none of the populations can be considered inordinately susceptible to stressors of climate, disease or predation, despite current land fragmentation levels.



- The states and WAFWA do not conclude there is a lack of genetic variability related to habitat fragmentation sufficient to threaten the continued existence and viability of the Lesser Prairie Chicken.
- During the time horizon of its existence as a species, the Lesser Prairie Chicken has demonstrated resilience to climate variation on the short and long term scale. As the climate warms, the species expands its range northward, and as it cools, it expands its range southward. During the 1930s (Dust Bowl) Lesser Prairie Chickens demonstrated the capacity to survive a combination of drought and high temperatures exacerbated by anthropogenic landform changes and habitat fragmentation characteristics that are unlikely to be repeated.
- Lesser Prairie Chickens routinely and typically display movement across areas occupied by manmade structures, highways, power lines, oil pads and active crop lands in search of forage or in response to stressors. New leks observed across the Arkansas River and the Interstate 70 corridor are indicative of the resilience, response and ability of Lesser Prairie Chickens to adapt to current fragmented conditions.
- Seasonal movement of Lesser Prairie Chickens in search of food, forage and nesting sites is normal behavior; observed and documented patterns and new leks observed across the Arkansas River and Interstate 70 corridor alleviate concern about edge effects associated with habitat fragmentation.
- Inconsistencies in population counting methodology, small sample size, survey bias, access issues, and auditory detectability issues - all recognized by USFWS - combine to result in significant underestimation of Lesser Prairie Chicken populations.
- Year-to-year declines or spikes in Lesser Prairie Chicken population counts are normal and a result of varying weather patterns.
- WAFWA and the states agree that improving conservation programs, brush management, and heightened awareness have slowed - in some cases reversed - habitat fragmentation; and that more than 90% of CRP Lands having expired contracts remain as grasslands favorable to Lesser Prairie Chicken occupation. This data is corroborated by USDA/FSA/NRCS/FS.
- Since 2008 Lesser Prairie Chicken populations have stabilized or are increasing depending upon habitat type and proximity to drought stricken areas.

- The 2013 hunting-season policy on Lesser Prairie Chickens, for \$2.50 per permit, clearly indicates Kansas Department of Wildlife, Parks and Tourism does not conclude that the Lesser Prairie Chicken is threatened in its Kansas Range.

#### *WAFWA Rangewide Conservation Plan*

- The responsible state agencies have access to the best quality, and most recent science and have primary interest in and responsibility for species preservation, placing them in the best position to assess the vulnerability of the Lesser Prairie Chicken to extinction.
- WAFWA and the states are on record as stating *“the Lesser Prairie Chicken is not now or in the foreseeable future at risk of extinction in all or a significant portion of its range.”*
- Development, preparation and promotion of the WAFWA Rangewide Plan are a reaction to the specter of a “threatened” designation corroborated by a position taken by WAFWA and the states as late as June, 2012.
- *The Lesser Prairie Chicken Conservation, Management and Study Plan* is a low-cost, local government effort that balances conservation of the Lesser Prairie Chicken with agricultural productivity, ensuring the continued existence of the species in tandem with the general welfare of Western Kansans.
- Existing state and federal conservation programs remain more than adequate, increasing in conservation scope and efficacy, and have sufficient authority to respond to and conserve Lesser Prairie Chicken populations.
- The WAFWA Rangewide Plan contemplates a new, non-governmental structure that would oversee administration of the program at an annual cost of \$27 million.
- Targeting of wind energy and electrical transmission infrastructure as responsible for predation and habitat fragmentation, to the exclusion of threats posed by trees, bridges, and grain elevators is speculative with an insubstantial scientific basis.
- Testimony that the primary predation threat to the Lesser Prairie Chicken emanates from mammalian sources brings into question contributions from raptor sources and minimizes the need for mitigation proposed in the WAFWA Rangewide Plan.

- The WAFWA Rangewide Plan was drafted by wildlife agencies of the 5-states along with select industries under guidance by USFWS; local government was excluded from the drafting process.
- The cost structure of the mitigation section of the WAFWA Rangewide Plan was negotiated between WAFWA and a small number of oil and gas companies to the exclusion of electric cooperatives, wind, agriculture and other potentially-affected industrial sectors.
- Through economic participation in a Major Federal Action the Kansas Department of Wildlife Parks and Tourism is a Cooperating Agency.
- Testimony by KDWPT revealed the mitigation portion of the WAFWA Rangewide Plan was prepared without consideration of the economic, cultural, social and minority impacts to the human environment.
- Conservation easements necessary to fulfill the 25% in perpetuity requirement in the WAFWA Rangewide Plan will result in property devaluations calculated to be as much as \$2,104,288,000.
- The mitigation fees contemplated by the WAFWA Rangewide Plan will primarily be born by industry, agriculture, communities and residents in the 32 counties comprising the Coalition.
- Neither USFWS, WAFWA nor the states have evaluated alternatives, economic impacts, cost/benefits, down stream impacts or implications of the Listing Proposal to industry, communities, schools, minority and low-income populations of the human environment resulting from certain increased energy and mitigation costs.
- Neither USFWS, WAFWA nor the states have evaluated the required “No Action” alternative.

### *Grazing*

- Throughout history millions of Bison in vast herds roamed the high plains, mob-grazing the vegetative landscape to stubble, pulverizing the soils and altering the landscape in the process. For their part, Lesser Prairie Chicken populations participated in, benefited from and adapted to grazing activities that characterize the high plains ecosystem.
- Contemporary ranchers and farmers utilizing working lands understand, nurture and guard those habitat, property and riparian areas upon which they depend - a fact particularly true in livestock grazing management.

- In its Listing Proposal, USFWS specifically recognizes the lack of Science “*on the extent, intensity and forms*” of potential impacts from grazing throughout the 5 State region, calling into question from the onset the need for the Regulatory Policies proposed in the Conference Opinion, NRCS Conservation Practices 528 and 425 and the Special 4d Rule.
- USFWS, through its Conference/Biological Opinion and Special 4d Rule, proposes to levy Regulatory Policies that according to USDA/FSA/NRCS/FS are both scientifically unjustified and unnecessary.
- Through its participation in the Conference Opinion process USDA/FSA/NRCS/FS is a Cooperating Agency.
- None of the 32 KNRC Counties were contacted by USFWS or USDA/FSA/NRCS/FS to coordinate during the Conference Opinion/Biological process.
- Conservation Practices 528 and 645 are tantamount to regulation as they impose new requirements on agricultural operations receiving federal subsidies - policies that will spill to agricultural operations that elect not to participate in federal programs.
- No analyses of the impact or benefit to agriculture, local business, communities or cultures resulting from the NRCS proposed Environmental Evaluation occur in the public record.
- Provisions in Conservation Practice 645 allowing Federal agencies to remove or modify structures on private properties could constitute a “Take” under the 5<sup>th</sup> Amendment of the US Constitution and Executive Order 12630.
- The imposition of permanent photo points as proposed under Conservation Practice 645 has no meaningful conservation purpose, is invasive, and imposes unnecessary restrictions on participants in government subsidy programs.
- Mob-grazing practices are beneficial to creating, sustaining and enhancing Lesser Prairie Chicken habitat and should be incorporated into all future federal programs and practices.
- The conservation practices found in the KNRC Lesser Prairie Chicken Conservation, Management and Study Plan are sufficient to protect, enhance and maintain Lesser Prairie Chicken habitat necessary to ensure the ongoing survival and vitality of the species.

### *Critical Habitat*

- The geographic “Focal Areas” and “Connectivity Zones” identified in the USFWS-endorsed WAFWA Rangewide Plan are by definition in the Endangered Species Act Critical Habitat.
- Under NEPA and recent appellate court decisions USFWS is required to perform an Environmental Assessment and either issue a Finding of No Significant Impact (FONSI) or enter the Environmental Impact Statement (EIS) process prior to proceeding with its Listing Determination.
- In its Listing Determination USFWS has not used all practical means, nor applied statutory laws and administrative rules necessary to identify, consider and balance conservation of the Lesser Prairie Chicken in productive harmony with the social, economic and cultural considerations within the 32 counties located in the Lesser Prairie Chicken range.

**Appendix A**  
**Table of Executive, Judicial, Congressional,**  
**and Policy Authorities**

Table of Authorities from KNRC Plans			
Authority	Citation	Requirement	Plan Reference
Federal Land Policy and Management Act	43 USC 1712(c)(9)	Requires Secretary to attempt to remain apprised of local Land Use [Conservation] Plans and assures consideration is given to local plans; Secretary is to assist in and attempt to resolve inconsistencies between Federal and non-Federal Government plans and attempt for meaningful involvement of local government officials. Applies in para materia.	Coordination Plan, Conservation Plan
National Environmental Policy Act	42 USC §§4321 - 4347 42 USC §4331 (a)-(c)	Provides the Policy of the Federal Government during major environmental action is to use “all practicable means,” to coordinate Federal plans with local governments, in order to promote the general welfare, and create conditions where man and nature exist in productive harmony fulfilling the social, economic, and other requirements of present and future generations of Americans.	Coordination Plan, Conservation Plan
Endangered Species Act	16 USC §§1531 - 1544	Section 4(b)(1)(A) provides the Secretary must take into account, through the mechanism of Coordination and in the context of science only, the KNRC Conservation efforts - prior to making determinations.	Coordination Plan, Conservation Plan
Judicial Review	Catron County Board of Commissioners v. USFWS 75 F.3d 1429	1995 Ruling by 10 <sup>th</sup> Circuit rejected USFWS position EA/EIS is not required “ <i>as Matter of Law</i> ” during Threatened 4d Proposal with Critical Habitat designation. The proposed Lesser Prairie Chicken 4d listing mirrors precisely the Catron County issues including designation of geographic “Focal” and “Crucial Habitat” areas in USFWS funded and endorsed WAFWA Rangewide Plan. KNRC holds NEPA process is required.	Coordination Plan Page 5; Appendix D Appendix E
Regulatory Flexibility Act	5 USC §§601-612	Major Federal Actions must include a Regulatory Flexibility Agenda or Analysis (RFA) that includes publication/notification to each affected county. The RFAs explore the range of alternatives and economic impact(s) to specific and identified governmental jurisdictions where actions are proposed, along with the reasoning and a schedule for the Proposed Action. RFAs typically include quantitative analysis of the economic impact(s) likely to occur to each small entity or business. The summary provides the nature, objectives and legal basis for Proposed Actions and competing alternatives which accomplish the same objectives, and any federal rules which may duplicate, overlap or conflict with the Proposed Action.	Coordination Plan Page 7
EO 12291	Agency Accountability; Duplication assessment; Cost/Benefit Analysis	EO 12291 provides proposed administrative decisions and regulations to based on adequate information, understanding of consequences, and Proposed Actions are not to be undertaken unless benefits outweigh the costs. Alternative analysis are to be performed and the least net cost alternative to society is to be selected; Agencies are to set regulatory priorities to maximize the aggregate net benefits to society, to take into account the condition of the particular industries and the economy affected by proposed regulations.	Coordination Plan Page 7
EO 12630	Governmental Actions and Interference With Constitutionally Protected Property Rights	The Fifth Amendment of the US Constitution provides private property shall not be taken for public use without just compensation. Executive departments are to be sensitive to, account for and evaluate potential private property takings to prevent unnecessary takings and establish if the actions worsen situations they are designed to protect as well as estimate cost to government if litigation becomes necessary. Executive departments are to weigh if a Proposed Action contributes more to public health and safety than the No Action alternatives.	Coordination Plan Appendix E



Table of Authorities from KNRC Plans			
Authority	Citation	Requirement	Plan Reference
EO 12372 EO 13575	Intergovernmental Coordination with State & Local Governments; White House Rural Council	Federal agencies are to Coordinate with elected local governments directly affected by a proposed Federal Action; if a local government develops its own Plan, Federal agencies shall utilize the local plan of process to determine official views of State; communicate early in process with local officials to explain actions; make efforts to accommodate communicate local elected officials' concerns; allow local governments to consolidate Federal plan submissions. Encourage State plans that meet objectives and standards and seek coordination views of local elected officials between states.	Coordination Plan Page 3
EO 13352	Facilitation of Cooperative Conservation	The Secretary of Interior is specifically required to Coordinate with local government in Conservation activities; DOI is to take appropriate account of and respect the interests of private property and in the interest of public [human] health and safety	Coordination Plan Page 6; Appendix E-4
Data Quality Act	Data Quality Act (Information Quality Act) Section 515(a) 3504(d)(1); 3516; 66 Federal Register 34489	Proposed Actions must be based upon usable, objective, timely, accurate, readably-accessible and reproducible data, information, facts, and research. The minimum federal standards are even higher for that body of information defined by OMB to be “influential” in nature - such as data used for decision making of important public policies.	Coordination Plan Page 7
EO 12866	Regulatory Planning and Review	Federal agencies are to conduct a Cost/Benefit analysis of alternatives, including No Action. C/B analysis is to consider quantifiable and qualitative measures. In selecting an alternative, agencies are to select approaches that maximize net benefits including potential economic, environmental and public health and safety.	Coordination Plan Revision 4
CEQ Regulations	40 CFR §1500 - 1508	Implements NEPA.	Coordination Plan Appendix B
CEQ Regulations	40 CFR 1508	Requires agencies in the EIS process to address the individual and incremental impact of each proposed environmental action(s) to the overall and aggregate environmental baseline.	Coordination Plan Appendix B
EO 12898 EO 12250	Environmental Justice and Minority Populations	Federal agencies are to identify and address impact to human health or environmental decisions on minority and low-income populations resulting from Proposed Rules programs, policies, and activities.	Coordination Plan Revision 3
Unfunded Mandates Act	2 USC §1501	Requires coordination and “special consideration” of local governments and the private sector during Proposed Actions that exceed \$50M; requires evaluation of “Direct Costs” or “Direct Savings,” to local governments as well as preparation of budgetary impact-estimates to each affected County.	Coordination Plan Revision 3
5/14/1998 DOI Policy Manual	Part 318 Chapter 3	DOI Part 318 DM3 is an internal DOI Procedural Manual entitled “ <b>Record of Compliance</b> ” (The ROC). The ROC specifically details compliance procedures to be undertaken, citing EOs 12866, 12612, 12988, The Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act. The purpose of the ROC is to “ <i>reduce the chance the Rule will be litigated</i> ” and it provides for signatures of the DOI Assistant Secretary prior to submittal of the Proposed Rule for Federal Register notification.	Coordination Plan Revision 3

**Appendix B**  
**List of Exhibits from**  
**Public Hearing and Administrative Record**

**Exhibits of KNRC Hearing Officer & Public Hearing  
Closed 5:00p.m. November 8, 2013**

<b>VOL</b>	<b>EXHIBIT</b>	<b>HEARING OFFICER TITLE</b>	<b>ADMITTED</b>
<b>1</b>	HO1	KNRC President Klemm-Opening Statement	X
	HO2	Notice of Public Hearing	X
	HO3	November 7, 2013 Appearance Schedule Agenda	X
	HO4	November 8, 2013 Appearance Schedule Agenda	X
	HO5	Logan County Timeline	X
	HO6	Response, Ms. Jacobsen, Solicitor	X
	HO7	Letter, Mr. Grant	X
	HO8	Response, Ms. Whitlaw	X
	<b>EXHIBIT</b>	<b>PUBLIC HEARING TITLE</b>	<b>ADMITTED</b>
	A	Data Do Not Support the Listing of LPC	X
	B	LPC Range Wide Conservation Plan	X
	C	Range Wide Conservation Plan for the LPC	X
<b>2</b>	D	Testimony of Carl Uhrich/attachments – continuation to volume 2	X
	D	Testimony of Carl Uhrich/attachments – continuation of volume 1	X
	E	Addressing the Human Dimensions of Wolf Reintroduction	X
	F	Disturbance of Lekking Prairie Chickens	X
	G	Natural Resource Coordination Plan	X
	H	LPC Conservation, Management and Study Plan	X
	I	Written testimony to KNRC by Michael White & Kim Goodnight	X
	J	Email from Whitlaw, Heather-USFWS KS Field Supervisor	X
	K	Facsimile to Heather Whitlaw of USFWS	X
	L	Letter Fred Grant-KNRC hearing officer to USFWS Solicitor Dana	X
	M	Activity Report	X
	N	KNRC News Release	X
<b>3</b>	O	USFWS News Release	X
	P	Testimony of Sheila Ellis	X
<b>2</b>	Q	Testimony of Keith Edwards	X
	R	Testimony of Kyle Hoffman	X
	S	Testimony on behalf of WAFWA and KDWPT	X
	T	Testimony of Mike Lewis	X
	U	Testimony of Bruce Graham	X
	V	Testimony of Representative Don Hineman	X
	W	Testimony of Lynn Freese	X
	X	Testimony of Kirk Thompson	X
	Y	Testimony of Paul Reynolds	X

	Z	Testimony of Clint Pearson	X
	AA	Testimony of Norman MacLeod	X
	BB	County Questionnaire	X
	CC	KDWPT Memorandum	X
	DD	Comment letter from Ralph Ostmeyer/Larry Powell to USFWS Dan	X
	EE	KNRC Public Hearing sign in sheets	X
	FF	Federal Register-Vol.77 No.238---Vol.78 No. 87---Vol.78 No. 131	X

**Exhibits of KNRC ADMINISTRATIVE RECORD**  
**Closed 5:00 p.m. CST, November 15, 2013**

<b>VOL</b>	<b>EXHIBIT</b>	<b>TITLE</b>	<b>ADMITTED</b>
<b>1</b>	I	Written testimony of James Ludolph	X
	II	Written testimony of Byron Sowers	X
	III	Written testimony of John J. Dowd, Jr. Pres. Syracuse Flying Service, Inc	X
	IV	Written testimony of Jeff and Sky Pate	X
	V	Written testimony of Lori Lennen	X
	VI	Written testimony of Ed Goedhart	X
	VII	US House Committee on Natural Resources (USHCNR) Hearing Notice 8-22-13	X
	VIII	Written testimony of Matt Knox, Montana Farm Bureau to USHCNR 9-4-13	X
	IX	Written testimony of Renee Taylor Environment Consulting to USHCNR 9-4-13	X
	X	US House Committee on Natural Resources (USHCNR) Hearing Notice 7-23-13	X
	XI	Written testimony of Kent McMullen Franklin Co Washington to USHCNR 8-1-13	X
	XII	Written testimony of Rob Roy Ramey II. Ph.D. to USHCNR 8-1-13	X
	XIII	Written testimony of Damien M. Schiff, Pacific Legal Foundation to USHCNR 8-1-13	X
	XIV	Written testimony of Kent McMullen Franklin Co Washington to USHCNR 8-1-13	X
	XV	US House Committee on Natural Resources (USHCNR) Hearing Notice 5-24-13	X
	XVI	US House Committee on Natural Resources Mega Settlement Agreements Map 6-4-13	X
	XVII	Written testimony of Tom Jankovsky, Comm Garfield Co, CO to USHCNR 6-4-13	X
	XVIII	Written testimony of Tyler Powell Dep Sec of Envir OK to USHCNR 6-4-13	X
	XIX	Written testimony of James Carlson, Exe Dir KNRC to USHCNR 6-3-13	X
	XX	US House Committee on Natural Resources (USHCNR) Hearing Agenda 7-31-07	X
	XXI	Written testimony of Rob Roy Ramey II. Ph.D. to USHCNR 7-31-07	X

<b>VOL</b>	<b>EXHIBIT</b>	<b>TITLE</b>	<b>ADMITTED</b>
2	XXII	Keith Sexson-KDWPT/WAFWA ltr to USFWS Benjamin Tuggle-R 2 6-2-12	X
	XXIII	KDWPT-statement--97% of Kansas PRIVATE OWNERSHIP--accessed 5-3-13	X
	XXIV	Public [Private] Land Ownership by State [50]—National Wilderness Institute	X
	XXV	CONFERENCE OPINION—6-30-2011—USFWS for NRCSs LPCI	X
	XXVI	USFWS Dir. Ashe/staff -Available to Media on Endorsement	X
	XXVII	POSITION Summary—Proposed Lesser Prairie-Chicken Threatened Listing/4d Rule	X
	XXVIII	Transmit-NRCP/LPCSMP; Notice of Hearing; Coordination Briefing request 8-23-13	X
	XXIX	KNRC-Talking Points – 9-14-13	X
	XXX	Excerpt 11-1-13 #2 Coordination Meeting w/ USFWS-insert full transcript upon completion	X
	XXXI	KDWPT Webinar Lesser Prairie-Chicken Update Presentation file slides 4-30-13	X
	XXXII	Mitigation Cost Estimations/Webinar Framework 4-30-13	X
	XXXIII	KDWPT News Release-extending historic LPC range outside Current-MAP 7-7-11	X
	XXXIV	WAFWA News Release 1 <sup>st</sup> Statistically Valid LPC Population estimate 10-3-12	X
	XXXV	WAFWA report Range-Wide Population size-LPC-2012 &2013	X
	XXXVI	KDWPT Prairie Chicken Lek Survey - August 2013	X
	XXXVII	Habitat Conservation Plan Grants by State FY 2009-Whooping crane/LPC Grant	X
	XXXVIII	Oklahoma 5 Factors presentation Grant information pages 4-24 & 25-12	X
	XXXIX	Excerpts Grants information -- 5-State RWCP October 2013	X
	XL	KDWPT News Release USFWS grant supporting GPLCC for 5-State plan 5-15-13	X
	XLI	Great Plains Landscape Conserva Coop Fact Sheet, LPC priorities, Charter 6-23-11	X
	XLII	Bipartisan Letter LPN change from 8 to 2 dated 2-21-12	X
	XLIII	Texas Comptroller-ESA economic impact exhibits 5-10-13	X
	XLIV	USFWS Dir Dale Hall Memo-Maintaining Integrity -Scientific Decision-making 2-3-06	X
	XLV	USDA (FSA-NRCS-FS) Comments on DOI-FWS Proposed rule LPC 6_7_13	X
	XLVI	Comments of Kansas Counties, KEC, , 171 landholders w/references 3-11-13	X

<b>VOL</b>	<b>EXHIBIT</b>	<b>TITLE</b>	<b>ADMITTED</b>
2	XLVII	Usefulness of the Umbrella Species Concept as a Conservation Tool April 21, 2003	X
	XLVIII	C Kay-Wolf Recovery-Hidden Agenda-not about wolves...about control of west-96	X
	XLIX	WINTER Surveys of NE Prairie Chickens/Management Implications October 1963	X
	L	Not So Private Property? Endangered Species Pose Problems for Landowners 12-16-09	X
	LI	Grouse Wars: Spotted Owl of the Prairie States Threaten Energy Production 12-6-12	X
	LII	Sen. Vitter--Op-Ed--Endangered Species Act's hidden costs 2-8-13	X
	LIII	Forbes-EPA Secret & Costly 'Sue & Settle' Collusion w/ Environ Org 2-17-13	X
	LIV	Salt Lake Tribune—Are endangered species endangering property rights? 3-8-13	X
	LV	Mountain States Legal Foundation-W Pendley-LPC Is Not Threatened 3-11-13	X
	LVI	WSJ-Using Sue & Settle to Thwart Oil & Gas Drillers-S Moore 10-4-13	X



## **Appendix C**

### **Acronym Glossary**

## Acronym Glossary

<b>Acronym</b>	<b>Definition</b>
BFF	Black-footed Ferret
BFFSHA	Black-footed Ferret Safe Harbor Agreement
CCAA	Candidate Conservation Agreement with Assurances
CDOR	Colorado Department of Revenue
CEO	Chief Executive Officer
CEQ	Council of Environmental Quality
CESAR	Center for Environmental Science, Accuracy and Reliability
CNOR	Candidate Notice of Reviews
CRP	Conservation Reserve Program
DOI	US Department of Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EO	Executive Order
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
FSA	Farm Service Agency
IRS	Internal Revenue Service
KDWP	Kansas Department of Wildlife and Parks (thru 6_30_11)
KDWPT	Kansas Department of Wildlife, Parks and Tourism
KEC	Kansas Electric Cooperatives, Inc
KNRC	Kansas Natural Resource Coalition
LPC	Lesser Prairie Chicken
NEPA	National Environmental Policy Act
NGO	Non-governmental Organization
NRCS	Natural Resources Conservation Service
SAFE	State Acres For wildlife Enhancement
SWAT	State Watershed Action Team
USC	United States Code
USDA	United States Department of Agriculture
USFWS	United States Fish and Wildlife Service
WAFWA	Western Association of Fish and Wildlife Agencies
WEC	Wheatland Electric Cooperative

# NOTICE OF PUBLIC HEARING

## **The Advisability Of Listing The Lesser Prairie Chicken as a Threatened Species Under The Endangered Species Act**

On Thursday, November 7, 2013 and Friday, November 8, 2013, between 9:00 am and 4:30 pm, The Kansas Natural Resource Coalition (KNRC), through its Hearing Council, will conduct a Public Hearing at the Clarion Hotel, 1911 East Kansas Avenue, Garden City Kansas 67846, to receive information and consider the advisability of listing the Lesser Prairie Chicken (LPC) (*Tympanuchus pallidicinctus*) as a Threatened Species under the Endangered Species Act (ESA).

The Public Hearing will be held for the purpose of receiving, analyzing and evaluating all relevant information regarding the proposed listing and to evaluate consistency of listing efforts with congressional acts, presidential executive orders, federal and state regulations, sound scientific principal, economic considerations, cultural and civic impacts, general environmental practice and established plans.

All persons, organizations and agencies possessing such information are invited to appear before the KNRC Hearing Counsel to offer testimony, oral and/or written, pertaining to the proposed LPC listing. The Hearing Counsel will receive information, including - but not limited to - LPC studies, population counts, scientific methodologies, historic and current data, range maps, impact studies, charts, alternative plans, conservation practices, correspondence, photographs, scientific conclusions and/or other relevant Lesser Prairie Chicken information, including but not limited to:

- Specific, tangible and documented natural and/or human threats to the LPC species, its habitat, range and/or ecosystem(s);
- Information, data and studies of future impact(s), if any, that would be expected to occur to the LPC species, its habitat, range and/or ecosystem(s) in the event a "not warranted" determination is made or no action is taken;
- Specific, tangible or measurable improvement(s) to LPC populations, habitats, ecosystems, and/or other benefits projected to result from, in conjunction with, or emanating out of a threatened-status listing determination under ESA;
- Information as to present/future impact(s) upon or benefit to the human environment, cultural systems, social cohesiveness, changes in economic circumstances, and/or changes to agriculture, commerce, industry or private property projected to result from, in conjunction with, or emanating out of a threatened-status listing determination and, alternatively, information regarding impact(s) emanating from a not warranted or no action determination under ESA;
- Public notifications, correspondence, comments and/or review opportunities from the Environmental Assessment (EA) or Environmental-Impact Statement (EIS) process, including Findings of Impact and similar, related NEPA procedural studies, and information relevant to the coordination process initiated by any federal agency with local government(s), if any.

Persons, organizations and/or agencies requesting to appear before the Hearing Council must submit a written Intent to Testify to KNRC, PO Box 93, Garden City, KS 67846 or KNRC.counties@gmail.com on or before 5:00 pm CST Monday, November 04, 2013. Copies of written and electronic information may be filed during the hearing, and the record will remain open for acceptance of written and/or electronic information until 5:00 pm CST on Friday, November 15, 2013. All written and electronic submissions shall be provided to the Hearing Counsel or received by land delivery at PO Box 93, Garden City, Kansas 67846 before the November 15 deadline.